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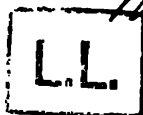




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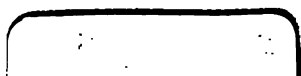
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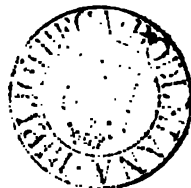
R E P O R T S
OF
C A S E S
ARGUED AND DETERMINED
IN THE
Courts of Common Pleas
AND
Exchequer Chamber,

WITH
TABLES OF THE NAMES OF THE CASES, AND THE PRINCIPAL
MATTERS.

BY JOHN BAYLY MOORE,
OF THE INNER TEMPLE, ESQ.

VOL. V.

CONTAINING THE CASES FROM MICHAELMAS TERM 1 GEO. IV.
1820, TO EASTER TERM 2 GEO. IV. 1821, BOTH INCLUSIVE.



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1823.

JUDGES
OF THE
COURT OF COMMON PLEAS,

DURING THE PERIOD CONTAINED IN THIS VOLUME.

The Right Hon. Sir ROBERT DALLAS, Knt. Lord Chief Justice.
The Hon. Sir JAMES ALLAN PARK, Knt.
The Hon. Sir JAMES BURROUGH, Knt.
The Hon. Sir JOHN RICHARDSON, Knt.

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Page 198, line 7, from the bottom of the marginal note,
for *defendant* read *plaintiff*.

C A S E S
 ARGUED AND DETERMINED
 IN THE
Courts of Common Pleas
 AND
Exchequer Chamber,
 IN MICHAELMAS TERM,
 IN THE FIRST YEAR OF THE REIGN OF GEORGE IV.

GEORGE EVANS BRUCE & Another v. BAINBRIDGE. 1820.

A CASE, of which the following is the substance, was sent by the direction of the Vice Chancellor, for the opinion of the Judges of this Court :

The Reverend *Lewis Bruce*, D. D. by will, bearing date the 22d of *October*, 1778, and duly executed and attested to pass real estates, after directing that all the debts that he should owe at the time of his decease, or that should appear

Devise of all testator's real and personal estates to his brother in fee, whom he appointed executor and residuary legatee. By a codicil, reciting the testator's will

and the death of his brother, and that the testator was possessed of considerable fortune, both real and personal, he, after a devise of a term of years in *Ireland* to his nephew *J. B.*, devised all his estates and lands in *Hertfordshire*, *Fluckley*, and *Middlesex*, to his nephew *G. E. B.*, and certain other lands in *Ireland* to his nephews *L. B.* and *C. B.*; and afterwards directed that his said nephews should not be entitled to the possession of the estates until they respectively became of age; and that, if one or more of them should die before attaining twenty-one, then he devised the estate of him or them so dying to his nephew *J. B.* and his issue lawfully begotten; and if *J. B.* should die without issue, then to his next brother *G. E. B.* and for default of such issue in *G. E. B.* to his nephew *L. B.*, and his issue, and in default of such issue in *L. B.*, to his nephew *C. B.* and his issue: There was a similar limitation to his nephew *S. B.* and his issue, and for default of such issue, to his niece *C. B.* and her issue, under such restrictions and limitations as she should think fit to dispose of the same amongst her issue "it being the intent of the will to prevent waste, by making the several children of devisor's deceased brother tenants for life only." The codicil then gave powers for devisor's nephews to make reasonable settlements on their wives, and to dispose of their respective estates among the issue of such marriages as they should think proper to limit and appoint. He then bequeathed the residue not disposed of to his nephews and niece aforesaid, except his nephew *S. B.*, to be divided among them equally at their respective ages of twenty-one; the shares of him or them so dying to go to the survivor or survivors of them:—Held, that *G. E. B.* took an estate for life only in the lands situate in the county of *Hertford*, devised to him by virtue of this will and codicil.

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to be due from him as executor to his father's will, except two legacies of 100*l.* each, given by his said father's will to the two sons of his late sister *Sarah Roberts*, should be paid out of his real and personal estate, which he charged with the payment thereof, devised as follows :—

“ And as touching and concerning all the real and personal *estates* as well in *England* as *Ireland*, which I am seised, possessed of, or otherwise entitled to, either in possession, reversion, or remainder, after payment of the said debts and legacies, I give, devise, and bequeath the same in manner following; (that is to say) I give, devise, and bequeath to my brother *George Bruce*, esquire, of the city of *Cork*, all my real and personal estate in lands, tenements and hereditaments, or otherwise, both in *England* and *Ireland*, to hold to him, his heirs and assigns for ever, subject and chargeable nevertheless with the payment of the aforesaid debts, and subject and chargeable also with the payment of the several annuities and legacies hereinafter given, devised, and bequeathed by this my will.”—Then followed directions as to the payment of several annuities and legacies to the devisor's relations and friends; and the will concluded with the following clause :

“ *Item*, all the rest, residue, and remainder of all my real and personal estate in *England* and *Ireland*, not heretofore disposed of, I give, devise, and bequeath unto my said brother *George Bruce*, esquire, his heirs, executors, administrators and assigns for ever; and I do hereby appoint, nominate, and constitute my said brother *George Bruce* sole executor and residuary legatee to this my last will and testament, hereby revoking all former wills by me heretofore made.”—By a codicil, dated the 18th of *February*, 1779, and duly executed to pass real estates, the devisor, after reciting the above will, and that he had appointed his brother *George Bruce*, lately deceased, residuary legatee and sole executor thereof, he nominated, constituted, and appointed his nephews *Jonathan*, and *George Evans Bruce*, executors of his said will, in the room of their father, de-

ceased. Then, after reciting that his brother, deceased, had by his will appointed the devisor residuary legatee and sole executor thereof, whereby he was legally seised and possessed of all the estates real and personal not otherwise disposed of by him; and that the devisor was seised and possessed of a considerable *fortune*, both real and personal, which, by his will, he intended for his said brother, deceased, except such parts thereof as were therein otherwise disposed of, he, by the codicil, willed and disposed of the *fortunes* aforesaid, in manner and form following.—Here followed a bequest of pecuniary and other legacies to the devisor's relations, friends, and servants, and a devise of tithes and of a term of lands in *Ireland*, to his nephew *Jonathan Bruce*; and the codicil then contained the following clause:

“To my nephew *George Evans Bruce* I devise, give, and bequeath all my estates, lands, tenements, and hereditaments in *Hertfordshire*, *Finchley*, and *Middlesex*, in *England*, which I am seised or possessed of in right of my late wife.”—The devisor then devised certain lands in *Ireland* to his nephews *Lewis* and *Charles Bruce*, and bequeathed certain stock standing in the long annuities to two trustees, in trust for his nephew *Saul Bruce*; and the codicil then proceeded as follows:

“And further, it is my will, that my said nephews shall not be entitled to the actual seisin or possession of the several estates, bequests, and annuities herein devised and bequeathed to them, until they shall respectively attain their several ages of twenty-one years, and that the issues and profits thereof, over and above what shall be thought necessary for their respective maintenances and education, shall annually accumulate for their respective uses as soon as they shall attain their several ages aforesaid; and if one or more of my said nephews shall happen to die before he or they shall attain his or their ages of twenty-one years as aforesaid, then, and in that case I devise and bequeath the estate and estates of what nature or kind soever, hereinbefore de-

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vised and bequeathed to him or them so dying, to my nephew *Jonathan*, and his issue lawfully begotten; and if he shall happen to die without issue, then I devise and bequeath the estates which he shall derive or be entitled to under and by virtue of this my will, to his next brother *George Evans Bruce*; and for default of such issue in the said *George Evans*, then the estates of the said *Jonathan* and *George Evans*, to go and vest in my nephew *Lewis*, and his issue as aforesaid; and for default of such issue in the said *Lewis*, then the estates of the said *Jonathan*, *George Evans*, and *Lewis*, to go to and vest in my nephew *Charles*, and his issue as aforesaid; and for default of such issue in the said *Charles*, then the estates severally herein devised and bequeathed to his brothers aforesaid, to go to and vest in my nephew *Saul* and his issue in like manner; and for default of such issue in the said *Saul*, then the whole of the estates devised and bequeathed to her brothers as aforesaid, to go to and vest in my niece *Catherine Bruce* and her issue, in such manner and under such restrictions and limitations as she shall think proper to dispose of the same, to and amongst her said issue; it being the intent and meaning of this my last will to prevent waste, by making the several children of my brother *George*, deceased, tenants for life only. And further, it is my will, that such of my said nephews as shall marry, shall be authorized hereby to make reasonable settlements upon such wives as they and each of them shall take, and dispose of their respective estates to and among the issue of such marriages, in such manner as they shall think proper to limit and appoint the same.—All the rest and residue of my worldly substance, of what nature or kind soever or wheresoever, not already disposed of by this my codicil, or by my last will, to which this is annexed, I devise, give, and bequeath to my nephews and niece aforesaid, except my nephew *Saul*, who is to take no part thereof, (being amply provided for otherwise) to be divided among them, share and share alike, at their respective ages of twenty-one years;

and if one or more of them shall happen to die before he, she, or they shall severally attain his, her, or their respective age or ages of twenty-one years, then, I will and direct, that the share or shares of him or them so dying, shall go to the survivors and survivor of them."

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The question for the opinion of the Court was, what estate the plaintiff *George Evans Bruce* took under the above will and codicil in certain lands situate at *Totteridge*, in the county of *Hertford*(a)? The case came on for argument in the course of the last Term, when

Mr. Serjt. *Lawes*, for the plaintiffs, submitted, that it was only necessary to advert to the will of the 22d of *October*, 1778, to shew, that the testator did not intend to die intestate as to any part of his estate. That intent is manifested in the body of the will; if not, the residuary clause would embrace every part of his property which might have been previously omitted. The codicil on which the question arises, refers to the will. Although the testator there stated, that he was possessed of considerable "*fortune*," that word must receive the same construction as if he had used "*estate*,"—as it refers to both his real and personal property. Effect must be given to the intent of the testator, as consistent with the rules of law, and tenor of the whole of the instruments. It is quite clear, that under the devise to the plaintiff *Bruce*, contained in the first clause in the codicil, the fee would have passed to him under the word "*estates*," accompanied as it was by the following words and description of the counties in which they were situate. *Holdfast*, d. *Cowper* v. *Marten* (b). *Fletcher* v. *Smiton* (c). So, the mere circumstance of locality will not have the effect

(a) The defendant had purchased the lands in question, part of which belonged to the plaintiff *Bruce* under the above will of his uncle; and it was objected, that he could not make a good title to convey it in fee.——(b) 1 Term Rep. 411.——(c) 2 Term Rep. 656.

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of restraining such a devise. *Roe, d. Child v. Wright* (a). If, however, it be contended, that the fee did not pass, in consequence of the subsequent limitations to the different other nephews of the testator in succession, and their issue, still, the words of the devise are at least sufficient to create an estate tail; for the word "issue" in a will, is equivalent to "heirs." The rule is laid down in *Shelley's case* (b), that "when the ancestor, by any gift or conveyance, takes an estate of freehold, and, in the same gift or conveyance, an estate is limited, either mediately or immediately to his heirs in fee, or in tail; that always in such cases 'the heirs' are words of limitation of the estate, and not words of purchase." The codicil contains no limited or qualified words to prevent the operation of that rule; for "default of issue" must have the same meaning as if the devise were made to the plaintiff and his issue in direct terms. The case of *King v. Melling* (c), is scarcely distinguishable from the present, and its authority has never been questioned. There, the devise was to A. for life, and after his death to his issue by a second wife (his first wife being then alive), and for default of such issue, to B., with power for A. to make a jointure to his second wife for her life; and it was held that A. took an estate tail; and Lord Hale there said (d), "Another objection was, that there being a power appointed to A. to make his wife a jointure, it shews, that it was intended he should have but an estate for life, which needed such a power, and not an estate tail; for then he might have made a jointure without it;"—to which his Lordship answered, "that tenant in tail, cannot, by virtue of such estate, make a jointure, without discontinuing or destroying his estate." It is quite clear, that the testator intended that his nephews should take estates tail in succession, as, in case of their deaths without issue, he devised the whole of his estates before given to them to his

(a) 7 East, 259.——(b) 1 Rep. 104, (a).——(c) 1 Vent. 214. 225. S. C. 2 Lev. 58. 3 Keb. 42. 52. 95. Pollexf. 101.——(d) 1 Vent. 232.

niece *Catherine*, and her issue; but a mere life estate could not be the subject of a devise over. The words "it being the intent and meaning of this my will, to prevent waste, by making the several children of my brother *George* tenants for life only," give no estate in themselves, nor do they profess to give any, but are only expressive of intention in a certain degree, and can therefore only operate in the nature of a condition: as such, they are void, and cannot control the decided intention expressed by the testator in the previous parts of the codicil, by giving to his nephews an estate tail. The rule, as to intention, is thus laid down (a): "Whenever the construction, upon the apparent intent of the testator, is not contrary to the construction upon certain established legal maxims, respecting the import of terms made use of by him, so far let the apparent intent be the guide in the construction, but not one jot further; and, whenever the terms of art made use of, do not fall within the allowed extent of any established legal maxim respecting their import and operation, there let the intent be the sole guide of construction; because, there, a more certain or better rule of construction is not sacrificed to it."

As to the question of intent, therefore, it is quite clear from the whole of the codicil, that the testator meant to give his nephews an estate tail; and, such an estate having been created, cannot be altered by those subsequent words, which, if they operate as a condition, are not only void and inconsistent with the rules of law, as they could not restrain tenants in tail from committing waste, but are repugnant to the estate previously given; and it is said (b), "that there are certain incidents and qualities so annexed to, and inherent in certain estates, as to be incapable of being restrained or prohibited by any proviso, condition, or limitation, and therefore, where an estate is limited to take effect upon any such restrictive condition annexed to a preceding estate, such

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(a) Fearn on Contingent Remainders, 7th edit. 172.—(b) Id. 256.



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limitation is held to be void, and incapable of taking effect at all."

Mr. Serjt. *Bosunquet*, *contrà*.—The plaintiff *George Evans Bruce*, took only an estate for life under the terms contained in the codicil in question. Although the word *estate* may carry a fee, or *issue* may have the same effect in a will as the word *heirs*, still, the intention must prevail. There may be a particular and general intention, and if they cannot both stand together, the former must give way to the latter, but both have been frequently sacrificed, in endeavouring to preserve the general at the expence of the particular intent,—and the rule as to such general intent cannot be carried further than it has already been. In *Pier-son v. Vickers* (a), (because intention could not be effectuated by any other means,) Lord *Ellenborough* said, "It is very doubtful in all these cases, whether we do not act contrary to the real intention of the testator in giving more than a life estate to the first taker." In *Ginger*, d. *White v. White* (b), Lord Chief Justice *Willes*, in delivering his opinion, quotes the words of Mr. Justice *Reynolds*, in *Law v. Davies* (c), who said, "Shall not a man be allowed to speak his own mind in a will? Surely a man ought to be allowed to do so, and yet, if we consider how miserably some wills have been tortured, we may fairly say that this is a privilege not always allowed to testators." Here, the words in the codicil, at the utmost, give the plaintiff only an estate-tail by implication, for there are none which extend the estate to his issue. If there were no words of restraint, he might have taken an estate-tail, not however by the force of the terms in the codicil, but by the expression of intent. Although such estate for life might be given in terms, as in *Robinson v. Robinson* (d), where it was held, that an estate-

(a) 5 East, 553.—(b) Willes, 351.—(c) Fitzg. 113.—  
(d) 1 Burr. 38.

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tail passed by implication, still, such estate must always be implied *ex necessitate*, as was there expressed in the certificate, and cannot be inconsistent with, or contradictory to the general intent of the testator. So, in *Langley v. Baldwin* (a), it was decided, that where such intent cannot be effected without giving the devisee an estate-tail, such a construction must be put on the devise. There, the devise was to *A.* for life, without waste, with a power for him to make a jointure, remainder to his first, second, and so to his sixth son (and no further); after which followed the words, if *A.* should die without issue male of his body, then to *B.* in fee; and it was resolved, that there being no limitation beyond the sixth son, and for that there might be a seventh, who was not intended to be excluded; therefore, to let in the seventh and subsequent sons to take (but still to take as issue and heirs of the body of *A.* in tail by descent and not by purchase), the Court held that the words "in case *A.* should die without issue male of his body," did, in a will, make an estate-tail. Still, no such necessity exists in the present case, for, independently of the express words, it is manifest that the testator only meant his nephews to take an estate for life, for he explained his intent to be to restrain them from committing waste. This, therefore, is not like the common cases where tenancies are created without impeachment; besides, the nephews were not to have the benefit of the inheritance, and they therefore only took estates for life. It was further provided, that "such of them as married might make reasonable settlements on their wives, and dispose of their respective estates to and among the issue of such marriages, as they should think proper to appoint." The issue of such marriages were not to take as heirs, but distributively, according to the disposition of their parents. If either one of the nephews, even if he remained unmarried, could be deemed to take an estate-tail, he might, by suffering a re-

(a) 1 Peere Wms. 759, n. S. C. 1 Eq. Cas. Abr. 185, pl. 29.

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covery, defeat the subsequent dispositions to the future grand nephews, which was clearly not the intention of the testator. In *Roe, d. Dodson v. Grew* (a), Lord Chief Justice *Wilmut* said, "that the word *issue* in a will, is either a word of purchase or of limitation, as will best effectuate the intention of the testator." It is only where the word *issue* may be used in a neutral sense, that it gives an estate-tail, for if it be clear that it can be intended as a word of purchase, it cannot do so, and the provisions made for the grand nephews of the testator, shew that with respect to them at least, it was used in the latter sense. In *Hockley v. Mawbey* (b), where a testator gave several parts of his freehold, and a future purchase of freehold with part of his personal, and all his leasehold estates to his wife for life, then to his son and his issue lawfully begotten, or to be begotten, to be divided among them as he should think fit, and in case he should die without issue, then over. Lord *Thurlow* said (c), "the limitation to the son and his issue would be an estate-tail, and perhaps the aptest way of describing an estate-tail according to the statute; but it is clear, he did not intend it to go to them as heirs in tail, for he meant they should take distributively, and according to proportions to be fixed by the son; and that it has been often decided, that where there is a gift in that way, the parties must take as purchasers, for there is no other way for them to take." The case of *Doe, d. Wright v. Jesson* (d) is expressly in point, and must govern the present. There, the deviser devised to *A.* one of the sons of his sister, before marriage, for his life, and from and after his decease to the heirs of the body of *A.* lawfully issuing, in such shares as he should by deed or will appoint, and for want of such appointment, to the heirs of the body of *A.* lawfully issuing, share and share alike, as tenants in common, and if but one child, the whole to such child, and for want of such issue,

(a) 2 Wils. 323.——(b) 1 Ves. jun. 143.——(c) Id. 149.——
 (d) 5 Mau. & Selw. 95.

to devisor's right heirs for ever ; and it was held, that *A.* and his children who were born after the death of the devisor, took only estates for life ; and Lord *Ellenborough*, in delivering his judgment, fully commented on the effect of the words " heirs of the body," as to whether they were to be understood in their ordinary sense, as importing an estate-tail, or as denoting children to take by purchase,—and Mr. Justice *Bayley* said (*a*), "I agree, that where there is a limitation to the heirs of the body of a person who has an estate for life given him by the same will, " heirs of the body" are *primâ facie* words of limitation, and enlarge the prior estate, and that in order to come to a contrary conclusion, it must be seen plainly, that the testator used these words in a different sense. But if it is plainly seen, that the testator used them in a different sense, then, we are not at liberty to treat them as words of limitation. The words " heirs of the body," if used as words of limitation, give no new interest to the heirs of the body, nor make them purchasers, but merely enlarge the ancestor's estate, giving him an estate descendable in a particular way," and then, after commenting on the clause which contained the power of appointment, he added (*b*), " that those words can never be taken in the sense in which they are commonly taken, that is, to enlarge the estate of the ancestor ; but they must be understood as giving a new and distinct estate to the objects of that power as purchasers." According to the decision in that case, the word " issue" must be here construed in the first, as by the devisor himself in the latter part of the codicil, viz. that the issue must take distributively as purchasers. The necessity, that an estate-tail must be created in the first taker, does not arise where he has a power to distribute among his children ; for the power of making a jointure is altogether distinct from that of a parent, who is empowered to make a distribution among his issue ; for he might appoint in fee, and if he omit to

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(*a*) 5 Mau. & Selw. 99. — (b) Id. 100.

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make any appointment, the Court of Chancery would consider it as a trust, and direct accordingly; *Brown v. Higgs (a)*. Although it may be contended, that the general intention of the testator may be effectuated by giving the plaintiff an estate-tail, still, it does not fall within the rule that a particular intent shall not take effect where it is inconsistent with such general intent. That rule has already been carried to great lengths, and ought not to be extended. The grounds on which the Court decided in *Robinson v. Robinson*, were given after the certificate was sent, but that case was not intended to infringe on that of *Backhouse v. Wells (b)*, and other previous decisions,—and there is no authority to warrant the construction contended for by the plaintiff, to militate against the declared intention of the testator, viz. to give his nephews estates for life only.

Mr. Serjt. *Lawes* in reply.—The power of appointment given by the testator to his nephews in the codicil, does not render them competent to give an estate in fee to their issue. It merely empowers them to make a settlement of their respective estates, with a bare power of appointment to their issue. They could, therefore, only settle such an interest as they themselves had. It has been said, that the general intent of the testator would be effectuated by giving his nephews estates for life only, but he devised to them in succession, and their issue; it is clear, therefore, that he meant to provide for such issue. If the first part of the codicil be restrained by the subsequent clause, it will altogether defeat the intention of the testator, to provide for the issue of his nephews. The power of appointment is equally consistent, by giving them an estate-tail as for life. The case of *Doe, d. Wright v. Jesson* is mainly distinguishable from the present, as there the devise was immediate to the nephew and his heirs, and the deviser did not profess to give the whole estate to the

(a) 4 Ves. 708. S. C. 5 Ves. 495.—(b) 1 Eq. Cas. Ab. 184, pl. 27.

devisee in the first instance, but only an estate for life, and his issue were only to take in such shares as he, by deed or will should appoint. If, therefore, he had made no appointment, the devise would be necessarily inoperative as to such issue, as the quantity of estate they would be entitled to take, depended entirely on the nature of such appointment. Here, however, it is quite the reverse, and if the plaintiff can be deemed to be only entitled to a life estate, it will be not only inconsistent with the intent of the testator, but repugnant to the terms of the whole of the codicil, under which, he at all events, took an estate-tail.

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Cur. adv. vult. (a)

The following certificate was afterwards sent to the Vice-Chancellor :—

This case has been argued before us by Counsel, we have considered it, and are of opinion, that the plaintiff *George Evans Bruce*, took an estate for his life only in the estate in question in this cause.

R. DALLAS.
 J. A. PARK.
 J. BURROUGH.
 J. RICHARDSON.

(a) Mr. Serjt. *Leas* took notes for the plaintiff, and Mr. Serjt. *Vaughan* for the defendant, but the Court observed, that they did not require a second argument.

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Tuesday,
Nov. 7.

LAMB v. NEWCOMBE.

SAME v. EDWARDS.

An affidavit to hold to bail by the plaintiff, stating that the defendant was indebted to him in a certain sum as indorsee of bills of exchange, drawn by E. F. upon and accepted by the defendant, payable to the order of the said E. F. at a day then passed, and indorsed to the plaintiff, is sufficient, without further shewing the relation between the plaintiff and defendant.

So an affidavit stating that the defendant was indebted to the plaintiff in a certain sum as indorsee of a bill drawn by E. F. upon and accepted by the defendant, payable to the order of E. F. at a day then past, is equally sufficient and certain.

THE defendant *Newcombe* was holden to bail on an affidavit sworn by the plaintiff, which stated, that the former was indebted to the latter in the sum of 400*l.*, as indorsee of six several bills of exchange, four of the said bills for 50*l.* each, drawn by one *W. Oldham*, upon, and accepted by the defendant, payable to the order of the said *W. Oldham* at a certain day now past, and indorsed to the plaintiff; and the two other of the said bills for the sum of 100*l.* each, drawn by *James Oldham and Co.* upon, and accepted by the said defendant, payable to the order of the said *James Oldham and Co.* at a certain day now past, and indorsed to the plaintiff.—The affidavit on which the defendant *Edwards* was arrested, stated, that he was indebted to the plaintiff in the sum of 36*l.*, as indorsee of a certain bill of exchange, drawn by *James Oldham and Co.* upon, and accepted by the defendant, payable to the order of the said *James Oldham and Co.* at a certain day now past.

Mr. Serjt. *Taddy* now applied for a rule *nisi*, that the bail-bonds which had been given in these causes, might be delivered up to be cancelled, and the defendants discharged, on entering a common appearance, on the grounds, that both these affidavits were defective, in not having disclosed the character in which the plaintiff was entitled to sue on the bills in question, and that it should have been stated that the bills were indorsed by the payees to the plaintiff, which did not clearly appear in the first affidavit, and in the second was omitted altogether (*a*). He admitted, that the

(a) See Tidd's Practical Forms, 4th edit. 96.

case of *Bradshaw v. Saddington* (a), appeared to render such statement unnecessary, but that in the subsequent case of *Perkes v. Severn* (b), it was held, that an affidavit stating the defendant to be indebted to the plaintiff as the acceptor of a bill of exchange, was too general, and insufficient. The distinction to be drawn between this case and that of *Bradshaw v. Saddington* is, that in the latter, it did not appear that the plaintiff was the payee; but here it is sworn, that the bills were payable to the order of *Oldham and Co.* and it should have been further stated, that they were indorsed by them to the plaintiff; his having merely sworn that a certain sum was due to him on a bill of exchange, is not sufficient, and therefore the title of the plaintiff to sue as indorsee of the bills in question, should have been correctly set out in the affidavits—but

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Mr. Justice PARK and Mr. Justice RICHARDSON, the only Judges in Court, held the above affidavits to be sufficient, and stated, that although it was now necessary to allege, that bills of exchange on which a defendant may be arrested, are unpaid at the time of the arrest, still, that it was not incumbent on the party to state the character in which the plaintiff is entitled to sue on them, and that the want of such description would not vitiate the affidavits.

Rule refused (c).

(a) 7 East, 94.——(b) Id. 194.——(c) And see *Warmsley v. Macey*, post.

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Wednesday,
Nov. 8.

DAVENPORT and Others, Assignees of HAWKINS,
a Bankrupt, v. CARTER and Another.

A. being indebted to *B.* and *Co.*, who became bankrupts, deposited a promissory note with the defendants as their assignees, and afterwards paid them the amount of the debt due from him to *B.* and *Co.* on which the note was given up; the commission against them was superseded, and another issued, under which the defendants were re-appointed assignees. Four months after *A.* had made the payment to them, he became bankrupt on a secret act of bankruptcy previously committed by him:—Held, in an action for money had and received, brought by his assignees against the defendants in their own right, between the superseding the first commission, and issuing the second, that they were not entitled to recover the payment made to the latter by *A.*, being protected by the 46 *Geo. 3. c. 135. s. 1*, as the subsequent commission re-vested those rights in the defendants which they believed to exist when the payment was made, and as such payment, if made to *B.* and *Co.*, could not have been disturbed, if they had remained solvent.

THIS was an action of *assumpsit* for money had and received. The declaration contained the common money counts. Plea, General Issue.

At the trial of the cause before Mr. Baron Graham, at the last Assizes at Winchester, it appeared that *Hawkins* had committed a secret act of bankruptcy in May, 1818, and that a commission was issued against him in May, 1819; that he was indebted to *Minchin* and *Co.* in the sum of 203*l.* 4*s.* 10*d.* against whom a commission of bankruptcy was issued on the 10th of November, 1818, and under which the defendants were appointed assignees;—that *Hawkins*, on being applied to, deposited with them, as such assignees, a promissory note for 200*l.*, given by a third person to him, and in the month of January, 1819, he paid them the above sum of 203*l.* 4*s.* 10*d.* who on receiving it, delivered up to him such promissory note;—that the defendants were not aware that *Hawkins* had committed an act of bankruptcy, or was in insolvent circumstances at the time the payment was made to them;—that the commission which had issued against *Minchin* and *Co.* was superseded in August, 1819, on the ground of a concerted act of bankruptcy, but another commission was issued against them in the month of September following, when the defendants were again appointed their assignees. Between the time of superseding the first commission against *Minchin* and *Co.*

and the re-appointment of the defendants as their assignees under the second, the plaintiffs, as assignees of *Hawkins*, demanded the above sum paid by him to them, and which they refused to pay; on which the plaintiffs commenced the present action against them individually, and not as the assignees of *Minchin and Co.*—For the plaintiffs, it was insisted, that they had a right to maintain this action against the defendants, as strangers, as at the time the payment was made to them by *Hawkins*, they merely acted as assignees under the first commission which had issued against *Minchin and Co.* and which was afterwards superseded, and must consequently be considered as a nullity;—that although they were re-appointed assignees under the second commission, it did not invalidate the plaintiffs' claim;—and that under the circumstances, this could not be considered as a payment within the 46 *Geo. 3. c. 135. s. 1 (a)*, no provisional assignee having been appointed to the estate of *Minchin and Co.* before the second commission had issued against them, and consequently, that the note must be considered as their property, and that the defendants had no right to deliver it up, although they then acted as the assignees of *Minchin and Co.* The learned Baron, however, was of opinion, that the payment having been made by *Hawkins* to the defendants more than two months before the commission was issued against him, and as they acted as assignees of *Minchin and Co.* at the time, and delivered up the note previously deposited with them, that they were protected by the statute, and the Jury accordingly found a verdict for the defendants.

(a) By which it is enacted, "That all payments by and to, and all contracts and other dealings and transactions by and with any bankrupt, *bonâ fide* made or entered into more than two calendar months before the date of the commission, shall be good, notwithstanding any prior act of bankruptcy committed by the bankrupt, in like manner as if no such prior act of bankruptcy had been committed, provided the person so dealing with such bankrupt, had not, at the time of such payment, contract, dealing, or transaction, any notice of any prior act of bankruptcy by such bankrupt committed, or that he was insolvent, or had stopped payment."

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Mr. Serjt. *Bosanquet* having yesterday applied for a rule *nisi* that this verdict might be set aside, and a new trial granted, and recapitulated the grounds as to the plaintiffs right to recover, the Court (a) were inclined to think that neither of the objections were tenable;

And Mr. Justice PARK on this day observed, that his two learned Brothers and himself having considered the case, were clearly of opinion that the verdict found for the defendants must stand. When the payment in question was made to them by the bankrupt *Hawkins*, they had not the slightest suspicion that he had committed any act of bankruptcy : Besides, four months elapsed after such payment was made, before the commission was issued against him. It is therefore perfectly clear, that if this payment had been made to *Minchin and Co.* and they had continued solvent, it could not have been disturbed, as it would fall within the protection of the statute 46 Geo. 3. c. 135. s. 1. It does not appear to us, that the case is altered by the bankruptcy of *Minchin and Co.* If the first commission had continued in force against them, it is equally clear the plaintiffs would not be entitled to recover. So, if no new commission had issued, the defendants having received this money as the assignees of *Minchin and Co.* would have received it to their use, and were liable to account to them for it. But, before they were called on to do so, a new commission issued against *Minchin and Co.* and the defendants legally assumed their rights as assignees. With respect to the promissory note which the defendants delivered up to *Hawkins*, if they should be deemed liable to the plaintiffs in this action, they could not, as the present assignees of *Minchin and Co.*, be placed in the same situation in which they stood, at the time the note was so given up.

Rule refused.

(a) Lord Chief Justice *Dallas* being absent.

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GOSS v. NEALE, Bart.

Wednesday,
Nov. 8.

THIS was an action on the case, brought against the defendant, as sheriff of *Essex*, for a false return of *nulla bona*, to a writ of *fiery facias*, sued out by the plaintiff, against the goods of the Honourable *Wellesley Pole Wellesley*, at *Wanstead House*.

At the trial of the cause before Lord Chief Justice *Abbott*, at the last Assizes at *Chelmsford*, it appeared, that previously to the levy, a deed had been duly executed by Mr. *Wellesley*, then residing at *Calais*, by which he assigned all his furniture, books, pictures, and other effects at *Wanstead*, to trustees, for the benefit of certain of his creditors, enumerated in a schedule thereto annexed, for the term of four years. By the deed, the trustees were empowered, at the expiration of two years from the date thereof, or sooner, if *Wellesley* should direct, to sell the furniture, &c. and after the payment of the expences attending such sale, to apply the residue in discharge of the debts of the creditors in the schedule above referred to. Then followed a covenant by those creditors, that *Wellesley*, until the month of *June*, 1822, might have licence and be permitted to continue at home or abroad, and that they would not molest, or cause him to be interrupted for the space of two years from the date of the deed. It was proved at the trial, that the house was locked up, and that the officer gained admission by stratagem, in order to execute the writ in question, and it was admitted, that the property found there was more than adequate to satisfy the plaintiff's demand. His Lordship being of opinion, that under these circumstances, the deed was valid, accordingly directed a nonsuit.

Where *A.* by deed assigned all his effects at *W.* to trustees, for the benefit of certain creditors for four years, and the trustees were empowered to sell at the expiration of two years, or sooner, if *A.* should direct, and apply the proceeds of the sale in discharge of the debts of such creditors, who covenanted that *A.* might continue at home or abroad, and that they would not molest him for two years from the date of the deed: Held, that such assignment was valid, and not within the statute 13 *Eliz.* c. 5, and that the property was thereby protected against a judgment creditor, who had sued out execution against *A.* after the deed was executed.

Mr. Serjt. *Onslow* now moved for a rule *nisi*, that this nonsuit might be set aside and a new trial granted. He

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submitted, that as the effects were not conveyed to the trustees for immediate sale, but were to continue under the control and direction of Mr. *Wellesley*, for two years from the execution of the deed, that it was fraudulent and void, within the 13 *Eliz. c. 5*, as it tended to delay, hinder, or defraud his creditors. In *Pickstock v. Lyster (a)*, where *A.* being indebted and sued by the plaintiff, pending the suit, and before execution, assigned all his effects by deed to trustees for the benefit of all his creditors, under which possession was immediately taken, it was held, that such assignment was not fraudulent within the statute; but no case has established that such an assignment can be valid, where the party has been allowed to exercise a dominion over his property after the execution of the deed. If the conveyance in question can be supported, not only will all *Wellesley's* creditors be delayed, but he himself will be privileged from molestation during two years, which might have been extended to a much longer, and even an indefinite period. The plaintiff is no party to the deed, and it would be most unjust that he should be thereby deprived of the fruits of his execution.

But the Court were of opinion, that this did not differ from the common case of a mortgage between *A.* and *B.* to which *C.* was no party. If the goods had been assigned, with a power for Mr. *Wellesley* to redeem them in four or six months, they would have been protected, although the interest continued in him; but this case is much stronger, as he has assigned them absolutely to trustees after the expiration of two years, and the proceeds were to be applied to the purpose of satisfying his creditors, and he could merely exercise a discretion whether they should be sold or not, before the expiration of that period. Besides, the effects in question formed but a small portion of his property;

(a) 3 Maul. & Selw. 371.

and it does not appear, but that he was *bonâ fide* indebted to the creditors mentioned in the schedule annexed to the deed of assignment; nor can it be inferred, that the transaction was fraudulent in itself, or that the deed was executed without consideration. The case of *Pickstock v. Lyster* is stronger than the present; and in *Hollird v. Anderson* (a), it was decided, that a debtor, unless prohibited by the bankrupt laws, may prefer, by assignment or payment, one creditor or particular creditors, if he does so in payment of his or their just demands, and not as a mere cloak to secure the property to himself. There, a warrant of attorney to confess a judgment was given by a debtor to one of his creditors, in order to defeat the pending execution of another creditor, and it was held good, and that such debtor might prefer one creditor to another.

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Rule refused (b.)

(a) 5 Term Rep. 235. — (b) See *Jezepek v. Ingram*, ante, vol. i. 189.

KEMP v. NEVILLE.

Monday,
Nov. 13th.

MR. Serjt. Pell, on a former day in this Term, had obtained a rule *nisi*, that the bail-bond which had been given in this cause might be delivered up to be cancelled, and an *exoneretur* entered on the bail-piece, on an affidavit of the defendant, which stated, that he was arrested shortly before the commencement of this Term, as the acceptor of a bill of exchange, at the suit of the plaintiff; that a commission of bankrupt had issued against the defendant on the 18th of April

Where an attorney was made bankrupt, and described in the *Gazette* as a "dealer and chapman," and obtained his certificate, and the plaintiff afterwards arrested him as acceptor of

a bill of exchange, payable before the commission issued, the Court discharged him on common bail, although the plaintiff swore, that he did not know that the defendant was the person mentioned in the *Gazette*, and that he intended to dispute the validity of the commission on the ground of fraud.— He should have stated the nature of such fraud, and when he discovered its existence.

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last ; that he obtained his certificate on the 6th of *July* following ; that the bill was due previous to the issuing of the commission, and might have been proved under it ; and, consequently, that the certificate was a bar to the plaintiff's demand.

Mr. Serjt. *Vaughan* now shewed cause, on an affidavit of the plaintiff, who swore that the defendant was an attorney practising at *Colchester*—that a commission of bankrupt was advertised in the *London Gazette* as having issued against one *Richard Neville*, “dealer and chapman,” under which description it was impossible for the plaintiff to know that the defendant was the person there described, as he believed that the latter was not liable to the bankrupt laws—and that the plaintiff now intended to dispute the validity of the commission, as he conceived it to have originated in fraud. The learned Serjeant contended, that this affidavit was sufficient to discharge the rule, and he relied on the case of *Stacey v. Federici (a)*, where the Court refused to discharge a defendant on common bail, on the ground of his having obtained a certificate as a bankrupt, and of the debt being thereby barred, if the validity of the certificate was meant to be disputed.

Mr. Serjt. *Pell*, in support of the rule, having stated that the plaintiff had taken no step to impeach the commission, which had been regularly issued and acted upon, was stopped by

THE COURT :—Without interfering with the case of *Stacey v. Federici*, this rule must be made absolute. The plaintiff should have petitioned the Chancellor to supersede the commission, instead of which, he has not taken any steps to invalidate it ; and although that may be accounted for by his swearing that he did not know that the defendant

(a) 2 Bos. & Pul. 390.

was the person mentioned in the *Gazette* under the description of a "dealer and chapman," yet, he has not disclosed enough by his affidavit to justify the Court in discharging the rule, as he has not sworn whether he believed any particular fraud to have been practised, or the ground of such fraud on which he intended to dispute the validity of the commission, nor even when he discovered it. The defendant was properly described in the *Gazette* as a "dealer and chapman" for the purpose of the commission, according to the cases of *Adams v. Malkin* (a), *Hutchinson v. Gascoigne* (b), and *Hurd v. Brydges* (c); as the question was, whether he fell within the provision of the bankrupt laws as a money scrivener.

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Rule absolute (d).

(a) 3 Camp. 534.—(b) 1 Holt. Ni. Pri. Cas. 507.—(c) Id. 654.

(d) In *Vincent v. Brady*, 2 H. Bl. 1, the Court refused to discharge a bankrupt defendant on common bail, where it appeared that the certificate was obtained by fraud. So, in *Sowley v. Jones*, 2 Sir W. Bl. 725, where a debt was on a bill of exchange, in which the bankrupt described himself as of a place where he had never lived, and the plaintiff never heard of the commission until after he had commenced his action, the Court refused to discharge such bankrupt.

BARFORD, Administrator of MARTHA ELIZABETH PITTS,  
v. STUCKEY.

Tuesday,  
Nov. 14th.

THIS was an action of debt. The declaration stated, that in the life-time of one *Nathaniel Pitts*, by a certain agree-

A deed *inter partes* is only available between those who are par-

ties to it:—Therefore, a deed between *A. B.* and the defendant of the one part, and *C. D.* of the other, whereby the two former agreed with the latter, his executors and administrators, to pay him a certain annuity for 21 years, or, in case of his death within the term, to the use of his child or children, if any, but if not, to his then wife, if she should remain his widow, and *C. D.* died within the term, leaving one daughter, who also died within the term, intestate, and his wife died in his life-time:—Held, that the administrator of the daughter could not maintain any action against the defendant, on the deed, for non-payment of the annuity, on the ground that she was no party to the deed, although she took a beneficial interest under it. But it seems that the administrator of *C. D.* might sue, as, in case of a recovery by him, he might be considered as a trustee for such daughter.



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ment under seal, made between one *Barnaby John Bartlett* and the defendant, of the one part, and the said *Nathaniel Pitts* of the other, after reciting that one *John Stuckey* devised certain lands to the said *B. J. Bartlett* in strict settlement, remainder to the defendant in tail, remainder to the said *Nathaniel Pitts* for life, with divers remainders over; and that in regard that the said *John Stuckey* did not make any further provision for the said *Nathaniel Pitts*, and in consideration of the great esteem which the said *B. J. Bartlett* and the defendant had for the said *Nathaniel Pitts*, they had agreed to grant him an annuity of 500*l.* *per annum*, for the term of 21 years, in case they should so long live, and that, in case of his death before the expiration of that term, they had further agreed, that they or the survivor of them would pay the said annuity for the term aforesaid, to and for the use and benefit of the child or children of the said *Nathaniel Pitts* (if any) in such proportions as he should by deed or will appoint, and, in default of such appointment, for the benefit of all his children equally; but in case there should be no child of his living at the time of his decease, then the said annuity was to be paid for the remainder of the said term of 21 years to his then wife, for such period of the term as she should continue his widow:—It was witnessed, that for the considerations aforesaid, they the said *B. J. Bartlett* and the defendant, did, by the said agreement, for themselves, severally and respectively promise and agree to and with the said *Nathaniel Pitts*, his executors and administrators, that they would, during the said term of 21 years, to commence on the 25th of *March*, 1810, in case they should so long live, well and truly pay or cause to be paid unto the said *Nathaniel Pitts*, or in case of his death within the said term, then unto and for the use of his child or children (if any); but if not, then unto his present wife, in case she should remain his widow, an annuity of 500*l.* at the times and in the manner therein mentioned. The plaintiff then averred, that the said *Nathaniel Pitts* died

during the term, without making any appointment respecting the said annuity—that *Martha Elizabeth Pitts* at the time of his death, was his only surviving child, and as such, entitled to receive the said annuity for the residue of the said term—that she died intestate during the term, and without making any appointment; and that the wife of the said *Nathaniel Pitts* died in his life-time—that, after the decease of the said *Martha Elizabeth Pitts*, administration of all her effects was granted to the plaintiff,—and assigned for breach, that three half-yearly payments of the annuity were in arrear and unpaid by the defendant. The defendant having cravedoyer of the deed, which contained the same stipulations and conditions as stated in the declaration, demurred generally, and the plaintiff joined in demurrer.

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The cause now came on for argument, when Mr. Serjt. *Taddy*, in support of the demurrer, submitted, that two questions arose, first, as to whether this or any other action could be maintained by the plaintiff, as administrator of *Martha Elizabeth Pitts*; and, secondly, if it were maintainable, whether, on the construction of the deed, any annuity was payable or not, under the events which had happened? As to the first question, the distinction is, that this deed is *inter partes*, and being so, all other persons must be considered as strangers, and not entitled to a right of action, although they may be beneficially interested; and it can only be available between those who are parties to it and their privies. The doctrine applicable to this point is laid down in *Scudamore v. Vandenstene* (a), which was an action of debt on a charter-party; and a distinction was taken between an indenture reciprocal, between parties of one part and parties of the other part, in which case no obligation, covenant, or grant, can be made to or with any, who is not party to the deed;—but where the deed indented is not reciprocal, but

(a) 2 Inst. 673.

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is without the words "between," &c., there the obligation, covenant, or grant, may be made to divers several persons.

That doctrine was recognized in *Storer v. Gordon* (a), where it was held, that a deed between *A.* of the one part, and *C.* of the other, whereby *A.* agreed to annul certain claims he had against *B.*, could not be pleaded by *B.* in an action against him by *A.*, brought to enforce those claims. This distinction is familiar in an action of covenant, and is equally so in debt, as was decided in the former case of *Scudamore v. Vandensene*. The only case which throws a doubt on this point is that of *Gilby v. Copley* (b), but in that case there was not any decision, three of the Judges differing in opinion from Mr. Justice *Levinz*, who said, "that it was common erudition, that one not party to a deed, made *inter partes*, cannot take by the deed, unless by way of remainder; and he cited the case of *Cooker v. Child* (c) in support of that position. He also observed, that "the case of *Dutton v. Poole* (d) was an *assumpsit* upon a verbal promise, and not founded on a deed." Besides, in *Gilby v. Copley*, the promise was general, and not to any person certain, although the payment was to be made to the plaintiff. Here, *Martha Elizabeth Pitts* was no party to the deed, and could confer no right to the plaintiff, to sue as her personal representative after her decease; and if any action be maintainable for the non-payment of the annuity, it should be brought by the administrator of *Nathaniel Pitts*.

Mr. Serjt. *Lens*, *contrd.*—This action is rightly brought by the plaintiff, as administrator of *Martha Elizabeth Pitts*. The interest in the annuity vested in her, during the remainder of the term, and now belongs to her next of kin; and the only remedy to recover the arrears is by the present action, brought by the plaintiff as her personal representative, and

(a) 3 Mau. & Selw. 322.—(b) 3 Lev. 138.—(c) 2 Lev. 74.
 (d) 1 Vent. 318. 332.

he alone could sue. This too, is an action of debt : if it had been covenant, the objection raised for the defendant might have great weight ; but no distinction can be drawn between an action of debt on an indenture, or a common promise in *assumpsit*. The case of *Dutton v. Poole* (a), was of the latter description ; and, if the gist of the action rests on an agreement, it makes no difference whether it be by parol or by deed ; and it merely established the principle, that if the cause of action arises on the agreement alone, it must be confined to the parties making it. There too, there was a relation between father and child ; and in *Martyn v. Hind* (b) Lord Mansfield said, “ as to *Dutton v. Poole*, it is matter of surprise how a doubt could have arisen in that case.” [Mr. Justice Richardson.—There, there was no written agreement, but the consideration moved from the father to the son.] It is immaterial whether the promise were in writing or not. There, it was with the father only ; but here, there is an apparent consideration to the daughter as well as her father. The case of *Gilby v. Copley* is precisely in point ; and though the plaintiff was no party to the agreement, no distinction was made between an action founded in *assumpsit*, or on the deed. There is nothing here to interfere with the doctrine laid down in *Scudamore v. Vandenslene* ; for it was there stated, that an action of debt would not lie, as it applies only to a debt arising out of the instrument itself ; and that authority is not now to be disputed. In *Coke Littleton* (c), it is stated, that “ there is a diversity to be understood, that any stranger to the indenture may take by way of remainder, but that he cannot take any present estate in possession, because he is a stranger to the deed.” Here, *Martha Elizabeth Pitts*, took by way of remainder, after the death of her father, all the interest which had be-

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(a) 1 Vent. 318. 332. S. C. 2 Lev. 210. Sir T. Raym. 302.—
 (b) Cowp. 443. S. C. 1 Doug. 146. See also Selwyn's Nisi Prius, 3d
 edit. 52. 3 Bos. & Pul. 119, n.—(c) 231, a.

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fore vested in him. Where a subsequent interest arises by the extinction of a former, it raises an obligation to pay money to the party who has such interest. [Lord Chief Justice *Dallas*.—Suppose the administrator of *Nathaniel Pitts* had refused to sue for the arrears of the annuity in question, would not a Court of Equity have compelled him to do so?] He might have brought the action, but the assets of the daughter did not belong to him, but were to be applied by the plaintiff for the benefit of her next of kin. The interest, therefore, is substantially created and vested in him, and does not arise out of the deed alone, or depend wholly on the covenant therein contained. *Storer v. Gordon* was an action of covenant, and was founded solely on the charter-party, which, being a deed made *inter partes*, could not operate as a release to strangers, but must be confined to those persons who were parties to it. So, in *Scudamore v. Vandenstene*, the debt arose on the instrument itself; and the cases there put, are those of bonds, covenants, or grants, on which alone the rights of the original parties arose, and on which only they could sue. If, however, an interest in remainder arises, there is no inconsistency in bringing an action of debt by the party so interested; for Lord *Ellenborough*, in *Storer v. Gordon*, observed (a), “as to the release, the objection is this, that where there is such a deed as is technically called ‘a deed *inter partes*,’ *i. e.* a deed importing to be between the persons who are named in it, as executing the same, and not as some deeds are, general to ‘all people’ the immediate operation of the deed is to be confined to those persons who are parties to it: No stranger to it can take under it, except by way of remainder, nor can any stranger sue upon any of the covenants it contains.” The distinction as to strangers to a deed taking by remainder, is recognized by Lord *Holt*, in *Salter v. Kidgley* (b), where his Lordship said, “that one who is party to a deed, cannot

(a) 3 Maul. & Selw. 322.—(b) Carth. 76.

covenant with another, who is no party, but a mere stranger to it; but that one who is no party to the deed may covenant with another that is a party, and thereby oblige himself, by sealing the deed." Here, the debt was created by the operation of law. The subsisting interest is substantially vested in the plaintiff, who, alone, is entitled to bring the action, on the defendant's legal liability to pay; and the parties were not compelled to have recourse to a Court of Equity, or oblige the administrator of *Nathaniel Pitts* (the father) to sue.

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Mr. Serjt. *Taddy*, in reply, was stopped by the Court.

Lord Chief Justice DALLAS.—It seems to me that the present action cannot be maintained by the plaintiff as administrator of *Martha Elizabeth Pitts*, on the ground, that she was no party to the instrument under which the annuity was granted. —It is therefore necessary, in the first instance, to see who the original parties to the contract were, and the relative situations in which they stood. It was an instrument under seal, and made between *Barnaby John Bartlett* and the defendant of the one part, and *Nathaniel*, the father of *Martha Elizabeth Pitts*, of the other part, and the covenant to pay the annuity was with him, his executors, and administrators, and his daughter was neither privy nor in any respect a party thereto, although, on the happening of a certain event, she would take a beneficial interest. Further:—The contract can alone be looked at to ascertain the respective rights of the parties. It is a general principle, that the right to sue on a contract or stipulation contained in a deed, must be confined to those persons who are parties to it. Here, the daughter was neither a party to the instrument, nor did the consideration move from her, but from her father alone, although the contract might enure to her benefit after his death, and the obligation arose out of the contract itself.


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It has been admitted, that an action might have been maintained by the administrator of *Nathaniel Pitts* the father, and if he had recovered he would have been placed in the situation of trustee to *Martha Elizabeth Pitts*. If he had refused to sue, a Court of Equity would have compelled him to lend his name; and having received the arrears of the annuity, as such trustee for *Martha Elizabeth Pitts*, he would have been bound to pay it over to her next of kin. As the contract, therefore, was in writing, and under seal, and confined in its operation to *Nathaniel Pitts*, his executors and administrators, I think the action would have been properly brought by his administrator. If the present be maintainable, it would have the effect of introducing two different actions, one of which must have been stayed. As, therefore, the administrator of *Nathaniel Pitts* might have been compelled by a Court of Equity to sue, and as that was a simple course of proceeding, I am of opinion that the action should have been brought in his name, and consequently, that the present cannot be maintained.

Mr. Justice PARK.—I am of the same opinion. Even assuming that there was a vested interest in *Martha Elizabeth Pitts* the daughter, it is still necessary to look at the deed by which the annuity was created. It was a mere contract with *Nathaniel Pitts*, his executors and administrators, and no one besides. If the present plaintiff could be entitled to maintain this action, the deed must be considered as introductory to it; but as it depends entirely on the contract contained therein, the parties to it alone can sue. It has been admitted, that the administrator of *Nathaniel Pitts* might have sued; but it was contended, that he could not be called on to act, when he had no beneficial interest in the result of the suit. But this is a case of every day's practice, and an executor or administrator is bound to fulfil the duties of the situation in which he is placed, and abide its conse-

quences ; and if he is compelled by a Court of Equity to sue, he is placed in the situation of a trustee, and must pay over the money when received by him. The decision of the Court in *Martyn v. Hind*, turned on the ground that there was no promise to the bishop ; and Lord Mansfield there said (a), that “ the contract was not with the bishop, but with the curate.” Here, it makes no difference, whether the action was brought in debt or covenant, the deed having been *inter partes*. I must confess, I cannot comprehend the reasoning adopted in *Dutton v. Poole* ; neither does it appear from the contract in that case, in what situation the parties stood. I therefore am of opinion, that this demurrer is well founded, and, consequently, that there must be judgment for the defendant.

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Mr. Justice BURROUGH.—There might have been considerable more weight in the argument for the plaintiff, if the deed had contained a grant of an annuity ; but it was a mere covenant with *Nathaniel Pitts*, his executors and administrators, for payment of the annuity in the manner therein agreed on. It is quite clear, that the deed must be resorted to and shewn, in order to sustain the present action, where three objections present themselves as to the plaintiff's right to recover. First, that the daughter of the deceased was no party to the instrument. Secondly, that the contract was made with her father, and not with her ; and, thirdly, that no legal interest was vested in her. It is true, there may be cases where a party may recover, but it must be in the instance of a mere chattel or equitable interest. In that case it would not be necessary to shew the deed ; but here, it was absolutely requisite, and, on its being produced, or stated on the record, it is quite manifest that no legal interest exists in *Martha Elizabeth Pitts*, to enable the plaintiff to sue as her personal representative. The case of *Dutton*

(a) Cowp. 443.

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v. *Poole* appears to me to have been rightly decided. There, the father was seised of lands in fee, and was about to cut timber therefrom, to raise a portion for his daughter. The defendant being his son and heir at law, promised the father, in consideration that he would forbear to fell the timber, to pay the daughter this portion. That was for the benefit of the daughter; and the question was, whether this amounted to a sufficient consideration to entitle the daughter and her husband to sue the son. There can be no doubt, but that it was, as it was originally intended, to raise a portion for the daughter. For these reasons, I am of opinion, that, in the present case, the defendant is entitled to judgment.

Mr. Justice RICHARDSON.—I abstain from giving any opinion as to whether this be an existing annuity or not; but I am quite clear that this action cannot be maintained by the plaintiff as the administrator of *Martha Elizabeth Pitts*. The doctrine laid down in *Scudamore v. Vandenstene* has never been disputed, nor is there now any necessity for so doing. Besides, it was recognized in *Cooker v. Child*, and adopted in the late case of *Storer v. Gordon*. It has been admitted that a stranger cannot sue in an action of covenant. Still, however, it has been insisted for the plaintiff, that a beneficial interest is vested in him, independently of the deed. But it provides for nothing but the contract. The former part of it is mere inducement, and its object is stated to be, that, for the considerations before expressed, the grantors promised, with *Nathaniel Pitts*, his executors and administrators, to pay him the annuity in question, or, in case of his death, to his child or children, if any. This instrument appears to have been duly executed, and is under seal. It does not appear that any child was then in existence. Besides, the deed is the foundation of the action, and it contains a mere matter of contract, and to which neither *Martha Elizabeth Pitts* nor the plaintiff, as

her personal representative, was a party. I therefore concur with the Court, that this action cannot be supported.

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Judgment for the defendant (a).

(a) A similar action was brought against *Bartlett*, in which the Court directed judgment to be entered for him.

TRUSCOTT v. CHRISTIE.

Tuesday,  
Nov. 14th.

THIS was an action of *assumpsit* on a policy of insurance, dated the 26th of *February*, 1819, at and from *Madras*, and all ports and places in the *East Indies*, to the *United Kingdom*, on freight and passage-money, valued at 5000*l.* by the ship *Cornwall*.

The declaration contained two counts on the policy. The first alleged, that the ship being at *Madras*, on the voyage insured, divers goods were loaded on board her, to be carried on freight on the said voyage—and that it had been agreed between the plaintiff and the agents of the *East India* Company, that the said agents should and would there load divers other goods on board the ship, to be carried on freight on the said voyage, and should put on board the said ship divers passengers to be carried on the said voyage from *Madras* to the *United Kingdom*, for divers large sums of passage-money to be therefore paid to the plaintiff, and that the plaintiff was interested in the freight and passage-money to the amount of the sum insured. The second count alleged generally, that the plaintiff was interested in the freight and passage-money in the policy mentioned, to the amount of the sum insured. Both counts alleged a total loss by the perils

Where the owner of a vessel had entered into a contract with the *East India* Company at *Madras*, through the medium of a correspondence with their agents, for freight, and the passage of invalids, and the ship had been surveyed by their officer, and represented to be fit for the purpose, after certain alterations had been made, and goods had been shipped, water taken in for the invalids, and the projected alterations commenced, but the completion prevented by the perils

of the sea:—Held, in an action on a policy on freight and passage-money, that there was an inception of the risk, and that the plaintiff was entitled to recover for passage-money as well as freight:—Held also, that a contract for such a purpose need not be by charter-party—nor precise nor definite in its terms.

of the seas. The declaration likewise contained the usual money counts. The defendant pleaded the general issue, and paid into Court a sufficient sum to cover his proportion of the freight of the goods actually on board the ship when the loss happened.

The defendant subscribed the policy set out in the declaration for the sum of 200*l*. The plaintiff was then sole owner of the ship *Coruwall*, and commanded her as master on the voyage insured. The ship was at *Madras*, bound from thence to the *United Kingdom*, in the beginning of *October*, 1818, and the following correspondence passed between the plaintiff and the agents of the *East India Company* there.

“ I beg leave to tender you the private ship *Cornwall*, of *London*, burden *per* register 425 tons, to receive any freight you may have for *England*, at the rate of 8*l.* *per* ton; I also have to tender you the said ship to carry forty invalids, at the rate of 28*l.* *per* man, the ship finding them with provisions, &c. according to your established regulation for victualling; I trust the Board, in accepting the above tender, will not object to pay the freight and passage-money on the shipment. I am, Gentlemen, your most obedient servant,

**"To the Honorable President and Gentlemen of the Board of Trade."**

To this the plaintiff received the following answer :—

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“ Board of Trade Office,  
12th Oct. 1818.

“ Sir,

“ Having laid your letter of this date before the Board of Trade, I am directed to acquaint you that they agree to pay you freight at the rate of 8*l.* sterling *per* ton for such quantity of goods as they may wish to lade in the *Cornwall*, reckoning cotton at fifty cubical feet to each ton ; and that they agree to recommend to government that the invalids shall be embarked on the *Cornwall* for *England*, at the rate you have mentioned, namely, 28*l.* *per* man, provided there be men ready to embark, and provided the accommodation intended to be allotted for their use shall be approved by the military surveying officer of government. It will be proposed to government, that the freight for the invalids, &c. shall be paid in *India* on the embarkation of the men ; the freight however for the goods cannot be allowed until the delivery of the cargo in the port of *London*.”

“ P. S. The Board expect that they may have the liberty to have the *Cornwall* surveyed previous to the shipment of the cargo, on account of the Company. I am, Sir, &c.

“ J. Gwatkin, Secretary.”

“ Fort St. George,  
13th Oct. 1818.

“ Sir,

“ Agreeably to your order, I have proceeded on board the ship *Cornwall*, and found her to be a fit vessel to receive the Company's cargo—also there is a space allotted for fifty invalids, &c. I am, Sir, your most obedient servant,

“ Rob. M'Nicholl, Surveyor.”

This letter was also attested and signed by

E. T. Gascoigne,  
The Deputy-Master Attendant in Charge.

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"To the Honorable President and Gentlemen of the Board of Trade.

"Gentlemen, "Madras, Oct. 13th, 1818.

"I beg leave in reply to your letter of yesterday's date, to accept of the terms of your tonnage as therein stated; I have also to acknowledge that of accepting at its cost price, the remaining saltpetre in your store; and hope, although you are incapable of granting the full payment of my freight home, you will allow me one-half, or a third, to enable me to clear my ship from this anchorage. I am, Gentlemen, &c.

"George Truscott."

"To the President and Members of the Board of Trade.

"Gentlemen, "Madras, Oct. 19th, 1818.

"I have at present offered accommodation for eighty-six invalids on board the *Cornwall*, but it has occurred to me, by giving an additional deck to the ship, it would with ease allow me to increase that number to two hundred, or such number, after survey, as it may be considered expedient to send, I will take the additional number on terms similar to what I before proposed. I have the honour to be, &c.

"Geo. Truscott, Owner."

"To the Secretary of the Marine Board.

"Sir, "Fort St. George, 19th Oct. 1818.

"With reference to Captain Truscott's letter to the Marine Board of this day's date, I have to acquaint you that I have consulted the officer by whom the ship *Cornwall* was surveyed, and he informs us that he is of opinion that the above ship will accommodate the number of men therein mentioned, and I see no reason why the deck should not be laid in ten or fifteen days. I have the honour to be, &c.

"E. T. Gascoigne,

"Deputy Master Attendant, &c."

" To George Truscott, Esq. Owner of the ship *Cornwall*.

" Sir, " *Madras, Marine Board Office, 22d Oct. 1818.*

" I am directed by the President and Members of the Marine Board to acknowledge the receipt of your letter of the 19th instant, and to inform you that the Right Honourable the Governor in Council has approved of your undertaking the projected alteration in the arrangement of the *Cornwall* on your own responsibility, *with an assurance from the government that such a proposition of invalids, &c. to the extent of 200 men will be embarked eventually,* as on the usual military survey, the ship shall be found capable of receiving with convenience for the voyage to *England*. You are requested to give two days notice to the Board, of the time when your ship will be ready for the survey. I am, Sir, &c.

" *J. Gwatkin, Secretary.*"

The *East India* Company's servants began loading goods on board the ship a few days after the original tender, and were employed in doing so till late in the evening of the 23d of *October*. Early in the morning of the 24th a violent gale came on, which drove the ship from her moorings, and by which she was so much disabled, that she was rendered incapable to perform the homeward voyage. At that time, there were loaded on board her about 140 tons of goods, and she could have carried about 80 tons more, besides passengers. When the gale came on, water had been shipped for one hundred invalids, besides the ship's company; but no invalids or passengers were on board, nor were any provisions laid in for them. The alteration in the ship, mentioned in the plaintiff's letter of *October* 19th, which was stated by him to be necessary, in order to enable him to carry the passengers, had not then been completed, but materials had been brought on board for that purpose, and three planks were laid. The Jury having been directed to find the amount of the loss separately, in respect

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of the freight and of the passage-money, they found that the ship could have carried goods, the freight of which would have amounted in all to 2200*l.* and that she could besides have carried invalids, on which a profit would have accrued to the amount of 1400*l.*

The verdict was found absolutely for 48*l.* being the defendant's proportion of the sum of 2200*l.* beyond the sum he paid into Court, and it was found conditionally for the sum of 56*l.* being the defendant's proportion of the said 1400*l.* for passage-money. The money paid into Court covered the freight of goods actually on board. The questions for the opinion of the Court were, first, whether the policy being valued, the valuation could be opened; secondly, whether the plaintiff was entitled to recover the sum of 56*l.* being the defendant's proportion of 1400*l.* for the passage-money?

The case now came on for argument, when

Mr. Serjt. *Blossett*, for the plaintiff, submitted, first, that it was a valued policy, and could not be opened; and secondly, that the plaintiff was entitled to recover for the passage-money. If he were not, it would be in vain to contend, after the decision of the Court of King's Bench in *Forbes v. Aspinall* (a), that the policy could not be opened. Here, the freight intended to be insured, was a full freight. So, the freight lost by the perils of the sea was a full freight. The general principle as to an insurance on goods on a valued policy is, that the valuation can only extend to those goods which were intended to be valued in the policy, as connected with the loss by a peril insured against. If the whole subject-matter intended to be covered by the valuation be lost, the assured may recover as for a total loss. The same rule applies to an insurance of freight, but the Court and Jury must be satisfied, that the freight intended to be insured, has been lost by the perils of the

(a) 13 East, 323.

sea. In *Forbes v. Aspinall*, it did not appear that the intended freight was so lost, because it was uncertain whether such freight could ever have been procured.

The learned Serjeant was proceeding with his argument, when the Court directed him to confine himself to the question relative to the passage-money. It may be contended, that the plaintiff cannot succeed unless he shew an express contract for the conveyance of the invalids to entitle him to freight, but the facts of the case clearly prove, that if there was not a specific contract, there was an engagement on the part of the *East India Company*, tantamount or equivalent to it. It is not necessary that the contract should be in writing, or under seal, but if there be a reasonable expectation that a full cargo may be shipped, a party has such an interest as will enable him to insure to the amount of the whole of the freight of such cargo. Here, the plaintiff had not only the reasonable expectation of receiving a full freight, but the engagement between him and the Company was in part executed, as the ship had begun to be repaired, and water was laid in for the invalids, exclusive of the ship's company, and she was to be appropriated to this specific purpose, which was only frustrated by the perils of the sea.

Mr. Serjt. *Taddy*, *contrd.* The amount of the loss, with respect to the freight of the goods, has been found and fixed by the Jury, but the plaintiff is not entitled to recover for the passage-money. There is an apparent distinction on the face of the policy between the freight and passage-money, the one being for the carriage of goods, and the other of individuals. It also appears by the correspondence, that the ship, at the time the contract was entered into, was only in a condition to receive goods on board, but not passengers. Although there might be a contract with respect to freight, still, there was none as to the passage-money to be paid for the invalids. At all events, it was a contract with a body corporate, which the *East India Company* could not enter

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into, except it were under seal, and their Secretary merely informed the plaintiff that the Board agreed to pay the freight for the goods, and to recommend to government that invalids should be embarked, provided there were men ready for that purpose; and the accommodation allotted for them should be approved of by the proper officer on the behalf of government. The men were never embarked, and the ship was merely began to be got ready for their reception. Although the plaintiff was afterwards informed, that the governor had approved of the projected alteration in the ship, and that 200 men should be embarked, still, it was a mere approval of a projected undertaking by the plaintiff, which was merely executory, and for which the plaintiff could not have maintained an action for a breach of contract. It is always difficult to determine whether freight be lost by the perils of the sea, as there cannot be an inception of risk in an insurance on freight, unless the contract for freight be fully ascertained and completed; and here, it is quite clear, that there was no inception of the risk, as the freight for the passage money was not even began to be earned. It is true, that with respect to an insurance on goods the case is different, for there, the risk commences as soon as any of them are put on board, for the owner then begins to earn freight. Although in *Thompson v. Taylor* (a) it was held, that an insurance on freight attaches on the ship sailing under the contract by which the freight is to be earned, although there was then no cargo on board, still, there was a charter-party between the parties under seal, by which it was provided, that the ship should depart from the *Thames* and proceed to *Teneriffe*, and there receive a cargo of wine on board, the freight of which the freighters covenanted to pay; and it was decided, that the contract for freight had its inception the instant the ship departed from the *Thames*. Here, however, it is immaterial whether there was any commencement of the freight on the goods, as the contract was to receive goods

(a) 6 Term Rep. 478.

and passengers ; and as the ship was not in a fit condition to receive the latter, there was no inception of the contract by which the passage-money was to be earned ; she should have begun to earn freight under the whole contract. [Mr. Justice *Burrough*.—If there had been no insurance, and the decks and other parts of the ship had been fitted up, and no man had been put on board, would not an action have been maintainable against the Company ?] It is a distinct question whether there were any other remedy, but certainly, no action could be commenced for freight, as there was merely an undertaking to ship the invalids on board, if the ship were put into a particular condition to receive them, but there was no specific contract to ship them at all events. In *Thompson v. Taylor* the amount of the freight to be earned was reduced to a certainty, viz. at the rate of 35s. *per* pipe for 500 pipes. Here, however, it was not known how many invalids were to be embarked, as it was merely provided, if there were men ready for that purpose, and the accommodation allotted for them should be approved of.—[Mr. Justice *Richardson*.—*Parke v. Hebbson* (a) was an action on a policy of insurance on freight. The ship was a seeking ship, and was to complete its lading at different places. Having got part of her cargo on board, she was lost by a hurricane in the *West Indies*, in endeavouring to pass from one port to another to complete her cargo. The plaintiff claimed to recover insurance on freight for that part of the cargo, which was not loaded at the time of the loss, as well as for that which had been put on board ; and he gave in evidence a number of letters from the owners of plantations in *Jamaica*, and other persons, expressing their intention of sending sugars and other goods on board, and the Jury thought that he was entitled to recover as for a full cargo. There was no complete or definite contract for any specific freight, but it was to be

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(a) Not yet reported. K. B., Mich. Term, 1816.

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paid according to the usual terms in that particular trade; and the Court of King's Bench refused to disturb the verdict, on the ground that it fell within the principle laid down in *Thompson v. Taylor*.] Here, the distinction is, there was no contract whatever; the Company were only bound to ship as many invalids as they thought proper. How, therefore, was the amount of the passage-money to be ascertained? The general rule is, that a policy on freight attaches on the loading of the cargo. So, here, some of the invalids should have been sent on board at all events, before there could be an inception of the risk to render the insurers liable for the passage-money. Besides, the Company were only to pay on their embarkation. Nothing however was begun to be earned here, as in *Thompson v. Taylor*, where the ship had sailed on her voyage, or as in *Parke v. Hebson*, where part of the cargo was on board, and the amount of the freight was to be ascertained by the usual terms of the *West India* trade. The rule, as laid down by Lord Chief Justice *Lee*, in *Tonge v. Watts* (a), has been since universally adopted, viz. that as the goods were not actually on board, so as to make the plaintiff's right to freight commence, he could not be allowed it. So, in *Thompson v. Taylor*, Lord *Kenyon* said, that "when that case came on at *Nisi Prius*, he thought the plaintiff was not entitled to recover, because he considered it as similar in every respect to that of *Tonge v. Watts*. But he observed, that *Thompson v. Taylor* depended upon its own peculiar circumstances." Here, too, a distinction has been taken in the policy between passage-money and freight, and they must therefore be treated as separate and divisible. In *Thompson v. Taylor*, *Horncastle v. Stuart* (b), *Atty v. Lindo* (c), and *Davidson v. Willasey* (d) the freight was provided for by charter-party, and there was either an inception of the risk or part performance of the contract for an entire voyage. Here, if there

(a) 2 Stra. 1251.—(b) 7 East, 400.—(c) 1 New Rep. 236.  
 (d) 1 Maul. & Selw. 313.

had been no insurance, and the ship had been fully put in order to receive the invalids on board, an action of *indebitatus assumpsit* could not have been maintained for the passage money, unless they had been embarked.—[Lord Chief Justice Dallas.—Was not the contract between the *East India Company* and the plaintiff, as master of the vessel, complete? was it not begun to be acted on? and was he not prevented from carrying it into effect by the perils of the sea, and if so, would he not have been entitled to recover, although none of the passengers were on board at the time the loss happened?—The passage-money might have been lost by other accidents than those insured against. The vessel might never have been put in order to receive the invalids as passengers, and unless she had been completed for that purpose, the plaintiff is not entitled to recover. This case is distinguishable from that of an ordinary insurance on freight, for by the terms of the correspondence, as well as the policy, the freight and passage-money are disjoined, therefore it cannot be an entire contract. Even if it were, the ship should have been completely fitted up to receive the invalids on board as passengers, and until that was done, there was not a sufficient inception of the risk to render the insurers liable for the passage-money, and more particularly so, as not a single invalid had been put on board before the loss accrued.

Mr. Serjt. *Blossett* in reply.—The case of *Thompson v. Taylor* not only shews that an insurance on freight attaches on the ship's sailing under the contract by which the freight is to be earned, though there be then no cargo on board, but that it is not even necessary for her to have arrived at the place where the goods are to be shipped. No distinction in point of principle can be drawn between freight and passage-money, the one being payable for the conveyance of goods, the other of individuals. Neither does it appear from the policy or correspondence, that such

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a distinction exists, for one entire sum was to be paid for both; and the manifest intention of the parties appears to have been, that the ship should have been completely filled with goods and passengers, which were to be furnished and provided by the *East India* Company, so that a full freight might be earned. Several of the provisions are in the nature of conditions subsequent, and a great part of the voyage might have been gone through before they would attach. But the plaintiff is entitled to recover, both from the nature of the contract and the terms in which it is framed. It was entire and in part executed on the commencement of the loading of the goods on board. Even if it were not so, the contract as to receiving the invalids on board, commenced the moment the alteration in the ship was begun. The preparation on board was equivalent to her sailing, and equally an inception of risk. Besides, the contract was so far completed on the part of the plaintiff that he might have sued the Company if they had refused to perform their part of it. It has been said, that the passage-money might have been lost by other accidents than the perils of the sea. That will equally apply to every case of insurance. It might have arisen under a charter-party, and if the correspondence in this case could be reduced to the form of an instrument of that description, and the ship had been lost before it was ascertained what part of the voyage she had performed, or the nature of the perils that had accrued to her, the plaintiff would not thereby be precluded from his right to recover. Here, he had appropriated the ship to the Company for the specific purpose of carrying their goods and conveying their invalids on freight, and would have been liable to an action if he had applied her to any other purpose without their sanction or permission.

Lord Chief Justice DALLAS.—This case resolves itself into three points. First, whether there was any contract? Secondly, if there was, whether any thing was done under it

by the assured? and, Thirdly, whether what was done constituted a part of the execution of the contract, and an inception of the risk insured against? As to the first, I entertain no doubt whatever. The whole rests in the correspondence, which most clearly constitutes the contract as to goods, for, independently of such correspondence, there would be no contract to take goods on board at all, and I am at a loss to draw any distinction between an insurance on freight and an insurance on goods; nor do I see that any reason can be assigned, why these letters do not constitute a contract for the one as well as the other. Leaving that distinction therefore out of consideration, the question will ultimately resolve itself to this, whether, on the face of the whole of the correspondence, there was a contract by the *East India Company* to ship passengers as well as goods. As to the latter, the contract has been admitted to exist, for the plaintiff had not only received part of the cargo on board, but has recovered for the freight of such goods. The only remaining question then is, as to the passengers. The plaintiff, as owner and master of the vessel, proposed to receive a certain number of invalids as passengers on board his ship. This proposal was tendered to the *East India Company* at *Madras*. Their officer informed him, that invalids should be embarked, provided the accommodation allotted for them should be approved of by the military surveying officer of government. A survey of the ship was afterwards made under the authority of the Company; whose officer reported that she was fit to accommodate 200 men, and directed the ship to be put into a proper state for that purpose. In consequence of this, the plaintiff proceeded to alter the ship, in order to receive them on board. This, therefore, was not merely a proposal by the plaintiff to the Company, but an absolute acceptance of it by them, as by their directions, the ship was surveyed and ordered to be put into a proper state to carry a specified number of men. On these facts, therefore, I have no doubt but that there was

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an inception of the risk by the inception of the contract, in causing the preparation of the ship. As to her being capable of carrying 200 men, that fact has been ascertained, and set at rest by the verdict of the Jury. This clearly, then, was such a contract as the plaintiff has asserted it to be. The next question is, whether any thing was done under it by the assured? That appears to me to be equally clear. The ship was put into a state of preparation to receive some passengers on board, and the completion of such preparation was prevented by the perils of the seas. This too, was done by the assured, and under the contract, and the commencement of such preparation undoubtedly constituted an inception of the risk. The essence of the contract was, that the ship should be put in a proper state to receive goods and passengers. Part of the goods were actually put on board, but it has been insisted, that as the alterations of the ship were not completed as to the reception of the invalids, the plaintiff could not be entitled to recover for the passage-money. But although none of the men were put on board, the ship had begun to be put into a proper state to receive them. That, therefore, was an inception of the voyage. Taking it in the most scrupulous point of view, the thing required to be done was in part effected. It is not necessary in all cases that goods should be taken on board the ship to render the insurer liable, if there were previously an inception of the voyage. Indeed, it appears, that in *Horncastle v. Stuart* no part of the cargo was shipped on board, but the Court held, that as the risk on the policy had commenced, the contract for freight had its inception, and that the plaintiff was entitled to recover. As to what shall be an inception of the contract, has been most clearly laid down by Lord *Kenyon*, in *Thompson v. Taylor*; where his Lordship observed (a), "that in the case of *Montgomery v. Eggington* (b) there was an inception of the contract, and the plaintiff recovered. So there, as the plaintiff had begun to

(a) 6 Term Rep. 482.———(b) 3 Term Rep. 362.

perform his part of the contract, as he had done something under it, which, if matured, would have entitled him to his freight, he thought he may recover on that policy, which was an insurance on that freight." That doctrine is applicable to the present case, for if the contract had been matured by completing the alterations in the ship, there could be no doubt whatever, but that the plaintiff would be entitled to recover. But such maturity was prevented by the perils of the sea. Under all these circumstances, I am clearly of opinion, that there was an inception of the risk. As to the objection, that the contract by which the amount of the freight to be earned by the plaintiff was indefinite and uncertain, the case of *Parke v. Hebson*, as cited by my Brother *Richardson*, appears to me to be precisely in point, and consequently there must be judgment for the plaintiff.

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Mr. Justice PARK.—I perfectly agree with the doctrine which has been previously laid down in cases of this description, but think it ought not to be extended. In deciding this case, however, it will not be necessary to break in on any of those authorities, and more particularly that of *Forbes v. Aspinall*, which appears to me to have been most rightly determined. My Brother *Taddy* has chiefly rested his argument on the ground that there was no specific or definite contract on which the plaintiff might have grounded a right of action, but here the question does not depend on the particular form of action or mode the plaintiff might have resorted to, to obtain redress for the breach of an agreement. Nor is it what remedy the assured had against the freighter, but is simply—was there a contract? All the cases cited have been determined within my recollection, except that of *Tonge v. Watts*; and in *Thompson v. Taylor* I thought it hard that the plaintiff should recover, as there were no goods on board at the time of the loss, but the Court there did not go on the ground whether there must be a charter-party under seal or not, but whether there was any

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contract under which, but for the perils of the sea, the plaintiff might have recovered. The late case of *Parke v. Hebson* goes the length of shewing that no specific contract is necessary, but that it might be derived from letters. It is quite clear that where there is a contract, it is not necessary that any part of the goods should be on board under it. That is manifest from the cases of *Thompson v. Taylor*, and *Horncastle v. Stuart*, where the capture took place before any part of the cargo was shipped. In *Atty v. Lindo*, though part of the cargo was on board, it was not that which formed the subject-matter of the insurance on freight. So in *Davidson v. Willasey*, a small part of the cargo only was on board. Here, the *East India Company* only acted through the medium of their agents, who entered into a contract with the plaintiff as owner of the vessel. Without adverting to what particular remedy he might have had against the Company if they had refused to perform the contract on their part, it is sufficient to say, that this case falls within the principle laid down in *Thompson v. Taylor*, and which appears to me to be there carried to its fullest extent. Here, there was clearly a part performance of the contract by the plaintiff. Water had been shipped for the express purpose of the invalids, as well as part of the materials necessary for the alterations, which were in fact began, although not completed. That completion was prevented by the perils of the sea, which if it had been matured would most clearly have entitled the plaintiff to his passage-money, and I therefore am of opinion that he ought to recover it in the present action.

Mr. Justice BURROUGH.—I agree entirely with my Lord Chief Justice and my Brother *Park*. The contract in itself is of such a nature, that if the plaintiff had *bonâ fide* completed it on his part, he would have had a claim against the *East India Company*. The contract appears to me to have been made perfect by the correspondence. The

ship was to be put in proper order, and he began to make alterations accordingly; if he had completed them, and the Company had refused to perform their engagements, they would be liable to make him compensation in an action for damages. But he had proceeded so far in the execution of the contract, that he could not take in other goods on his own account, as the ship was to be completely filled with their goods and the invalids to be furnished by them. They therefore would have had a right of action against him if he had refused to take any of the goods they might choose to send on board. Nothing turns on the form of the contract, and no distinction can be drawn whether it was by charter-party or by letters. The term "charter-party" frequently tends to mislead and perplex, but it amounts to nothing more than a contract under seal, and an agreement of any description is equally valid, so that a contract can be derived from it. Here, therefore, if the contract to be deduced from the correspondence was complete, it was not necessary that the invalids should have been put on board the vessel under it, for if every thing was done by the plaintiff, which was necessary to be done, up to the time of the loss, it would be the hardest possible case if he could not recover. No distinction can be drawn between freight and passage-money, except that in the one case the article to be conveyed is a dead article, and in the other it may be considered as live stock. There is much more inconvenience and expence attending the providing for the latter than the former; and I therefore concur in thinking that the plaintiff is entitled to recover.

Mr. Justice RICHARDSON.—This is an action on a policy at and from *Madras* to *Great Britain* on freight and passage-money, valued at 5000*l.* At the trial, the Jury found a verdict for the plaintiff for 104*l.* being the defendant's proportion of the loss insured against, but that verdict was found absolutely for 48*l.* being his proportion for the

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freight of goods, and conditionally for 56*l.* as to the passage-money. The only question then, is, whether the plaintiff is entitled to recover this latter sum in addition to the former. It is unnecessary to consider whether this being a valued policy, the valuation could be opened, nor has the Court the discretion to disturb the verdict for 48*l.* but the point is confined solely to the contract for the conveyance of the invalids as passengers, from which the plaintiff seeks to recover the sum of 56*l.* as passage-money. That will depend on the question, whether there was a sufficient contract between the parties for the shipment of such passengers; and I am of opinion there was. The plaintiff originally proposed to carry 40 invalids at 28*l.* *per* man. He afterwards offered accommodation for 86, and stated, that by giving an additional deck to the ship, he might increase the number to 200, or as many as after survey might be deemed expedient. The survey was accordingly made, and the Company's officer approved of the undertaking, and stated, that the ship was capable of carrying the 200 men. And further, the governor afterwards approved of the projected alteration, and an assurance from government was added, that 200 invalids should be eventually embarked. No question was made at the trial, as to whether the ship might not have conveniently received and conveyed that number of invalids as passengers. On the facts now before the Court, the Jury found that she might, and I therefore think that the Company were bound to put them on board.—Next, as to the contract, no precise or definite form is necessary, all that is requisite is, that it be sufficient. The case of *Parke v. Hebson* shews, that any contract equivalent to a charter-party is enough. The main objection raised by my Brother *Taddy* in the course of his argument was, that this was not a subsisting contract, as something remained to be done by the plaintiff before the passengers could be sent on board, *viz.* the completion of the additional deck, which was merely began when the loss happened. That amounted

to nothing more than a particular mode of fitting up the ship; and it is a usual stipulation in charter-parties, that the owner shall fit up the ship in a particular way, and rig and equip her for the voyage, according to the wishes of the charterer; and if a loss should happen before she was completely equipped, it would form no objection as to the assureds' being entitled to recover in an action on an insurance on freight. If it were stipulated in a charter-party, that additional bulk-heads should be made, or partitions in the hold for the reception of a particular cargo, it could be no defence to the insurer, that the vessel was lost before the partitions were completed. It has been further insisted, however, that the plaintiff's gains might have been defeated by other risks than the perils of the sea; but if there is a reasonable certainty that benefit will be obtained, it is no consequence that it may possibly be defeated by any other cause:—For instance as, in the case of profits, which may be defeated by a variety of circumstances; and Mr. Justice *Lawrence*, in *Thompson v. Taylor*, said (a), “that it seemed to him that the plaintiff clearly had an insurable interest. That as to the objection that it was only a speculative interest, it was not unlike the case of *Grant v. Parkinson* (b), where it was held, that the profits of a cargo of molasses might be insured, notwithstanding the statute 19 Geo. 3. c. 37.” That is a much stronger instance than the present, as here the alterations in the ship would have been completed, but for the storm which occasioned the loss. I therefore think the plaintiff is entitled to recover the sum of 56*l.* in addition to that of 48*l.* as found for him by the Jury.

Judgment for the plaintiff accordingly, and the verdict to stand for 104*l.*

(a) 6 Term Rep. 483.——(b) Park on Insurance, 6th edit. 354.

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An affidavit of debt made by I. S. that the defendant was indebted to the plaintiff in a certain sum, as acceptor of a bill of exchange, bearing date on a certain day, drawn by the plaintiff on, and accepted by the defendant, payable two months after date thereof, and due at a day now past, is sufficient, without further shewing the relation between plaintiff and defendant, or adding that the bill remained unpaid.

THE defendant was held to bail on the following affidavit of debt:—"James How, of, &c. clerk to John Warmsey, of, &c. on his oath saith, that Robert Macey is justly and truly indebted unto the said John Warmsey, in the sum of 45*l.* and upwards, as the acceptor of a certain bill of exchange, bearing date the 10th of April last, drawn by the said John Warmsey for a valuable consideration on, and accepted by the said Robert Macey, payable two months after the date thereof, and due at a day now past. The deponent further saith, that he is the managing clerk of the said John Warmsey, that he was well acquainted with the said Robert Macey, and negatived a tender by the latter to the former, to the best of his knowledge and belief."

Mr. Serjt. Pell on a former day in this Term, had obtained a rule to shew cause why the bail bond in this cause should not be delivered up to be cancelled, and the defendant discharged upon entering a common appearance, on the ground of insufficiency in the affidavit. He founded his motion on the following objections; First, that it did not appear in what capacity the plaintiff sued, nor did the affidavit shew what relation existed between him and the defendant; Secondly, that it was not sworn that the bill still remained due and unpaid, as it merely stated that it was due at a day then past; and in support of that objection he relied on the cases of *Machu v. Fraser* (a), and *Balbi v. Batley* (b); Thirdly, that when the affidavit was originally sworn, the defendant's christian name was stated to be *Joseph* instead of *Robert*, and that the one was afterwards erased, and the other substituted in lieu thereof. He therefore submitted, that at all events it required a new stamp, as it was a material alteration,

(a) 2 Marsh. 483. S. C. 7 Taunt. 171. — (b) 1 Marsh. 424. S. C. 6 Taunt. 25.

and lastly, that the surname of the deponent was spelt *How* in the body of the affidavit, and that he had put his signature to it by the name of *Howe*. The Court granted the rule on the two first objections only.


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Mr. Serjt. *Onslow* now shewed cause, and relied on the case of *Davison v. March* (a), where an affidavit, stating the defendant to be indebted to the plaintiff as indorsee of a bill, without alleging the bill to have become due, was held sufficient. He also referred to *Tidd's Practical Forms* (b), and *Impey's Practice* (c), to shew that the present affidavit was consistent with the forms there adopted. The cause of action is sufficiently and distinctly set out, viz. that the defendant was indebted to the plaintiff as the acceptor of a bill, of which the plaintiff was the drawer, and which was overdue when the affidavit was made. In *Coppinger v. Beaton* (d) the Court said, that no precise form of words was required to be used in an affidavit to hold to bail, and they added, that the Courts ought not to entangle suitors in unnecessary niceties.

The learned Serjeant was proceeding with his argument, when the Court called on Mr. Serjt. *Pell* to support his rule.

The cases on this subject are, at all events, contradictory. The mere statement that the defendant was *indebted* to the plaintiff, is not sufficient to shew that the bill must of necessity remain unpaid. In *Taylor v. Forbes* (e) an affidavit, stating only that the defendant was indebted to the plaintiff for goods sold and delivered, and not stating by the plaintiff to the defendant, was held insufficient, and Lord *Ellenborough* there said (f), "the strictness required in affidavits of debt, is not only to guard defendants against perjury, but also against any misconception of the law by those who make the affidavits, and the leaning of my mind is always

(a) 1 New. Rep. 157.——(b) 4th edit. page 96.——(c) C. P. 6th edit. page 76.——(d) 8 Term Rep. 338.——(e) 11 East, 315. (f) Id. 316.

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to great strictness of construction, where one party is to be deprived of his liberty by the act of another." In *Balbi v. Batley* (a), the same mode of avoiding the objection was resorted to, as in this case, and Lord Chief Justice *Gibbs* there observed, "that it was usual to state the connexion between the plaintiff, and the other parties to promissory notes, in order to shew how the plaintiff became entitled." The word "indebted," therefore, does not cure the defect arising from the want of a statement that the bill remained unpaid. The case of *Perks v. Severn* (b) established the same principle. Besides, here, the relation between the plaintiff and defendant is not sufficiently set out, for it should have been stated that the bill was payable to the plaintiff or his order at a day then past (c). Nothing can be intended by the Court in affidavits of this description;—on the contrary, they will require precision and certainty. In *Machu v. Fraser*, Lord Chief Justice *Gibbs* said (d), "the plaintiff swears the defendant is indebted on a bill drawn by the plaintiff upon, and accepted by the defendant. Every word of this may be true, and yet the plaintiff may not be entitled to arrest the defendant, and if so, certainly it is not such an affidavit as can support this arrest." It is worthy of observation, that the case of *Bradshaw v. Saddington* (e) was not referred to in *Balbi v. Batley*, but in that case it was stated, that the bill was long since due and unpaid, and the decision of the Court turned entirely on the character in which the plaintiff sued. In the late case of *Sands v. Graham* (f) it was held, that an affidavit, stating that the defendant was indebted to the plaintiff in a certain sum on two bills of exchange, drawn by the plaintiff on, and accepted by the defendant, was insufficient, as it did not state that the bills were due and unpaid; and here it is merely alleged that the bill was due at a day past, but it does not go on to state that it remained unpaid.

(a) 1 Marsh. 424.——(b) 7 East, 194.——(c) Tidd's Forms, 96.
 (d) 7 Taunt. 173. S. P. 2 Marsh. 484.——(e) 7 East, 94.——(f) Ante,
 vol. iv. page 18.

Lord Chief Justice DALLAS.—This is an application to the Court, that the defendant may be discharged out of custody on filing common bail, on the ground of insufficiency in the affidavit under which he was arrested. The action was commenced by the plaintiff as drawer, against the defendant as acceptor of a bill of exchange. The affidavit sets forth the relative situation of the parties as drawer and acceptor, the time when the bill was payable, and that it was due at a day then past, but it omits to state that the bill still remains unpaid. It has been objected, first, that the relation between the plaintiff and defendant is not sufficiently shewn, or in what character the former sued; and secondly, that although the bill is stated to have become due, it does not express that it still remains unpaid. In the outset, it is necessary to observe, that the affidavit is conformable to the precedents contained in all the books of practice. The first question therefore is, whether these precedents be erroneous or not? It has been said, that the cases which have been decided on this subject are contradictory. If it rested on principle, there would be no difficulty whatever. It is therefore necessary to examine those cases in order to ascertain their general result. It is a well known principle, that in affidavits of this description, a subsisting and sufficient cause of action must be shewn, and that the plaintiff had a right to arrest the defendant at the time the affidavit was sworn. As to what shall be a sufficient cause, must depend on the subject-matter of the action. In cases for goods sold and delivered, the form of the affidavit has been settled by a number of decisions. Further, it is necessary, that in point of form, affidavits of this description must be certain and explicit, and strictly pursued, for the reasons stated by Lord *Ellenborough* in the case of *Taylor v. Forbes* (a). Independently of that decision, there are several cases in which the question has arisen as to the sufficiency of an affidavit to hold to bail on bills of exchange and promissory

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(a) 11 East, 316.

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notes, and the first rule established by them is, that the relation between the parties must clearly appear, *viz.* in what character the plaintiff sues, and what party the defendant is to the instrument, to make him liable thereon. This appears to me to have been sufficiently stated in the present instance, *viz.* that the defendant was indebted as the acceptor of a bill drawn on him by the plaintiff. Next, then, it must be shewn, that the plaintiff has a right to arrest; it is not sufficient to state that the defendant is indebted, and no more, because he may be indebted, and the day for payment may not have arrived when the arrest is made. It is therefore necessary to shew, not only that the debt is payable at a certain day, but that it remains unpaid. Whatever however amounts to a statement, or shews that a bill has become due, is equivalent to stating that it is payable and unpaid. Here, the affidavit states, that the bill was due at a day past, and that the defendant, as acceptor, was indebted to the plaintiff as the drawer thereof. That is sufficient in terms to shew that it remained unpaid, for if it had been paid, the statement that the defendant was indebted to the plaintiff would be altogether false, and if he were not so, the party making the affidavit might be indicted for perjury. Thus far I have proceeded on principle, which none of the cases cited tend to contradict. I will therefore now briefly examine those cases on which the present objections have been founded. In *Balbi v. Batley* the affidavit was similar to the present in this respect, *viz.* in stating that the bill was payable at a day then past, without adding that it remained unpaid. No objection however was there raised as to this point, but it was confined to the single ground that it did not appear that the bill was indorsed or made payable to the plaintiff; and the Court held, that it should have been shewn in what character he claimed, and in what relation the defendant stood. That case however, if not over-ruled, was much broken in upon by *Machu v. Fraser*, where it was observed by Lord Chief Justice Gibbs, that *Bradshaw*

v. Saddington was not referred to in *Balbi v. Batley*. Without however examining whether the latter case was properly decided or not, it is sufficient to state that it need not be recognized as being applicable to the present. In *Bradshaw v. Saddington*, the affidavit stated, "that the defendant was justly indebted to the plaintiff in 100*l.* and upwards, upon and by virtue of a certain bill of exchange drawn by the defendant, and long since due and unpaid." The objection there raised was altogether different from the present, *viz.* that it was not at all stated in what character the plaintiff charged the defendant to be indebted to him, and it was held, that the affidavit was sufficient. That case, therefore, is a direct authority as to the first objection here raised. The Court there said, "that the affidavit sufficiently indicated the ground on which the plaintiff had holden the defendant to bail, that it was upon a bill of exchange, drawn by the defendant, on which he was justly indebted to the plaintiff, and it was not necessary for the plaintiff to specify in what particular character, whether as payee or indorsee he claimed." Nothing whatever was there said as to the bill's remaining unpaid. In *Sands v. Graham* it was not stated when the bill became due. It is quite clear, therefore, that that was not sufficient. On common sense and reason I entertain no doubt whatever; and when the cases are looked at and examined, with the exception of *Balbi v. Batley*, in which *Bradshaw v. Saddington* was not referred to, there will appear to be no inconsistency whatever, and the decisions are perfectly reconcileable with each other. On those cases, therefore, as well as on principle, sense, and reason, it appears to me that the present affidavit is sufficient.

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Mr. Justice PARK and Mr. Justice BURROUGH concurred.

Mr. Justice RICHARDSON.—No case has established that it is necessary to state in an affidavit to hold to bail on a bill

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of exchange, that such bill remains unpaid. It is sufficient to shew that it is overdue. Whether the decision of this Court in *Balbi v. Batley* were correct or not, still the objection there taken, seems to have been abandoned in the subsequent case of *Machu v. Fraser*. It appears to me that the rule was rightly laid down in *Bradshaw v. Saddington*, and the practice of this Court, in framing affidavits of this description has been conformable to that decision.

Rule discharged (a).

(a) See *Lambe v. Newcombe*, ante, page 14, and the cases on this subject collected in Chitty on Bills, 6th edit. 348, where the distinction is taken in affidavits of debt against the acceptor and indorser of a bill of exchange. The former being primarily liable, it is necessary to state, that such bill was due, or at least to shew the date and when it was payable; but in an action against the indorser, who can only be liable in default of the acceptor, and whose liability is only collateral and conditional, it is not necessary to shew that the bill is overdue; and in *Eldon v. Mortlake*, 1 Chit. Rep. 648, an affidavit, stating that the defendant was indebted to the plaintiff on a bill payable to a third person at a day now past, was held sufficient, without stating at what day the bill was payable, and without shewing the connexion between the payee and the plaintiff; and Mr. Justice Best there observed, that, "if in point of fact the bill was payable on a certain day now past, the statement in the affidavit was sufficient, and it sufficed that the plaintiff swore that the defendant was indebted to him, for if he were not so, the defendant might indict him for perjury." In *Edwards v. Dick*, 3 Barn. & Ald. 495, an affidavit, which stated that the defendant was indebted to the plaintiff as drawer of a bill, was held insufficient, as it was not stated that the bill was due; and Lord Chief Justice Abbott there laid it down as a general rule, that such statement was necessary, and accordingly over-ruled the case of *Davies v. March*, 1 New Rep. 157. So, in *Humphries v. Williams*, 2 Marsh. 231. S. C. 6 Taunt. 531. an affidavit, stating that the defendant was indebted to the plaintiff as indorsee of a bill drawn by one T. W. at a day now past, without stating how the defendant became liable, whether as acceptor or indorser, was held insufficient. It is necessary to state in what particular character the debt is due to the plaintiff, for if he had no interest in the bill on which he could sue the defendant, he or the party making the affidavit would be guilty of perjury, and in the latter case, Lord Chief Justice Gibbs adverted to the distinction between the plaintiff's title and the defendant's liability.

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CHARLTON and Wife v. DRIVER.

Friday,
Nov. 17.

At the trial of this cause before Lord Chief Justice Dallas, at Westminster, at the Sittings after the last Hilary Term, a verdict was taken by consent for the plaintiffs for 60*l.* 3*s.* 4*d.* subject to the opinion of the Court, on the following case:—

The plaintiffs being possessed of an estate in Surrey, which they held by lease from the Archbishop of Canterbury, dated the 9th May, 1812, for the term of twenty-one years, and which would expire on the 9th of May, 1833, did, on the 20th November, 1816 (in consideration of the rents and covenants reserved and contained on the part of the lessees, to be paid and performed) grant an underlease of part of the above estate to the defendant and his brother (since deceased) for a term of eighteen years from Lady Day, 1815, in which last mentioned lease, the plaintiffs covenanted with the lessees, at the end of the above term, to grant them a new lease of the said premises for such further term as would make in the whole fifty-nine years, from Christmas, 1775, at the same rent, and which fifty-nine years term so to be granted, would expire at Christmas, 1834; and at which period, the interest of the lessees would altogether determine. There was a covenant contained in the lease from the defendant and his brother—"That they would from time to time, and at every time during the said term of eighteen years, pay to the plaintiffs, or the said Archbishop, such part of the fine and fees, which, upon every renewal by the plaintiffs of the lease by which they held the premises thereby demised (amongst others) should be paid or payable by the plaintiffs in respect of the premises thereby demised to the defendant and his brother." The lease,

The plaintiffs being possessed of lands, which they held under the Archbishop of Canterbury by lease, renewable on payment of certain fines and fees, under-let such lands to the defendant for a term, who covenanted "that he would from time to time, and at every time during the said term, pay to the plaintiffs, or the Archbishop, such part of the fine and fees, which, upon every renewal by the plaintiffs, of the lease by which they held the premises demised (among others) should be paid or payable by the plaintiffs in respect of the premises thereby demised to the defendant:—Held, that the reasonable construction of this covenant was, that the defendant only intended to pay fines

commensurate with his interest in the premises.

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dated the 9th *May*, 1812, from the Archbishop to the plaintiffs, was a renewed lease, as was also the lease of the 20th *November*, 1816, from the plaintiffs to the defendant and his brother, who paid to the plaintiffs their proportion of the fine and fees on such renewal. On the 9th *May*, 1819, (seven years after the last lease from the Archbishop was granted,) the plaintiffs again renewed their lease with him, and upon such renewal, the premises, the subject hereof, were demised by the said Archbishop to the plaintiffs for a term of twenty-one years, commencing on the 9th *May*, 1819, the date of such lease. This last term would expire on the 9th *May*, 1840, and the fifty-nine years term agreed by the plaintiffs to be made up and granted to the defendant and his brother, would expire at *Christmas*, 1834, when their interest would terminate, as before stated. The plaintiffs, on the last renewal on the 9th *May*, 1819, paid to the Archbishop of *Canterbury*, 1118*l.* for a fine thereon, and 16*l.* for the fees of such renewal, of which fine and fees so paid by the plaintiffs for such renewal, 81*l.* 3*s.* 4*d.* was paid in respect of the premises demised by the plaintiffs to the defendant and his brother, but with reference to such extended term granted to the plaintiffs as aforesaid, and exceeding in point of time, the interest which the defendant and his brother were entitled to in these premises (which would expire at *Christmas*, 1834) for five years and upwards. The defendant's proportion of the above sums of 1118*l.* and 16*l.* in respect of that part of the estate which had been demised to him and his brother by the plaintiffs, in the event of the defendant's being liable to reimburse the plaintiffs so much of the fine and fees as were applicable to the whole extended term of seven years, obtained by such last renewal as claimed by the plaintiffs, was 81*l.* 3*s.* 4*d.* but in the event of the defendant (who survived his brother) being liable to reimburse the plaintiffs such part only of that sum as might be applicable to the defendant's interest in the said premises, and to the period which would elapse between

Lady Day, 1833 (when the defendant's present lease would expire) and *Christmas*, 1834, up to which time only he would be entitled to have the term granted to him and his brother enlarged, being one year and nine months or thereabouts, then his proportion of the above sum would be no more than 21*l.*—The plaintiffs declared in covenant on the lease of the 20th *November*, 1816, for 81*l.* 3*s.* 4*d.* stating that sum under a *videlicet*, as having been paid by them in respect of the premises demised to the defendant and his brother for the fine and fees on the last renewal. The defendant pleaded that the plaintiffs ought not to have their action for more than 21*l.* stating that such part of the said fine and fees so paid upon such renewal as aforesaid, in respect of the premises demised to the defendant, amounted to 21*l.* and no more, and a tender of that sum to the plaintiffs, with a *profert in curiâ* of the money tendered. The plaintiffs replied, that such part of the said fine and fees so paid on such renewal as aforesaid, in respect of the demised premises, amounted to a larger sum than 21*l.* to wit, the said sum of 81*l.* 3*s.* 4*d.* mentioned in the declaration, whereupon issue was joined. It was agreed that either party should be at liberty to refer to the pleadings, and to the lease of 1816. The question for the opinion of the Court was, whether the plaintiffs were entitled to recover more than the sum of 21*l.* paid into Court. If they were, the verdict was to stand, but otherwise a nonsuit was to be entered.

The case came on for argument this day, when

Mr. Serjt. *Taddy* for the plaintiffs submitted, that the only question was, whether, considering the intention of the parties, the defendant was liable for the whole sum payable on the renewal, or only a proportional part for the time he and his brother were to occupy. The interest of the plaintiffs at the time of the demise to the latter would expire on the 9th *May*, 1833, and the under-lease granted by the

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plaintiffs to the defendant and his brother, would also expire at the preceding *Lady Day* in that year. But the plaintiffs covenanted therein to grant them a new lease to expire at *Christmas*, 1834, which would extend their term in the premises one year and nine months beyond the plaintiffs interest therein. It may be said, that it would be unjust for the defendant to be compelled to pay the whole of the fine on the renewal, when he merely derived an interest for so short a period, but if he intended that the covenant should be limited, it should have been so expressed, but he has covenanted to pay such part of the fine which upon every renewal should be paid or payable by the plaintiffs in respect of the premises demised. If it was meant to have been a limited covenant, it should have been expressed that he would only pay a fine proportionable to the interest he had in the premises, and more particularly so, as the fine payable by the plaintiffs to the Archbishop was in gross. The word *premises* in the deed of the demise, is merely descriptive of locality, and confined to the tenement, and not the interest the defendant and his brother were to have in the term. [Mr. Justice *Burrough*.—The word *premises* bears relation to the whole of the deed, and the term forms part thereof, and is inseparably connected with it.] The defendant was to occupy at a trifling rent, and from the extension of the term granted to him, it is evident he intended to pay the whole fine, as he was fully aware that it was the custom to renew every seven years, and that there could be only one renewal as applicable to his interest. Besides, he covenanted to pay the fine and fees which might become payable on every renewal from time to time; it is therefore reasonable to suppose, that he intended to pay the whole of the fine due to the Archbishop on the renewal, both from the reason of the thing and the express terms of the covenant.

Mr. Serjt. *Blosset*, *contra*, was stopped by the Court.

Lord Chief Justice DALLAS.—Covenants are to be construed according to the obvious intention of the parties, as collected from the whole context of the instrument, *ex antecedentibus et consequentibus*, and according to the reasonable sense of the words. If there be any ambiguity, then, such construction shall be made as is most strong against the covenantor, for he might have expressed himself more clearly, and this general principle has been applied to the construction of leases; for it has been holden, that under a lease for seven or fourteen years, the lessee only, has the option of determining it at the end of the first seven years^(a). The reasonable and proper construction of the covenant in question is, that the defendant and his brother only intended to pay fines proportionably with their interest in the premises. Of the justice of the case there can be no doubt, and if the Court were to adopt the construction contended for by my Brother Taddy, it would not only be unreasonable, but contrary to the intention as expressed in the deed, for the defendant did not contemplate a renewal oftener than once during the remainder of his term.

The rest of the Court concurring, they ordered

Judgment of nonsuit to be entered.

(a) See *Doc. d. Webb v. Dixon*, 9 East, 15.

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WOOD v. PERROTT and two others.

Saturday,
Nov. 18.

MR. Serjt. *Lens* on a former day in this Term had obtained a rule *nisi* that the annuity and judgment entered up thereon in this cause might be set aside, and the warrant of attorney

An annuity deed contained a covenant by the grantor, that he would not at any time

during the continuance of the annuity, go upon the seas, or parts beyond them, without first giving the grantee seven days notice in writing of such his intention, in order to enable him to pay such additional premiums of insurance as might be incurred on account thereof, which premiums the grantor covenanted to pay to the grantee :—Held, that it was not necessary to state such covenant in the memorial under the statute 53 Geo. 3. c. 141.

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on which it was founded might be delivered up to the defendants to be cancelled;—the memorial for registering the annuity not having taken any notice either of the agreement by the grantor to pay the costs and charges of preparing and perfecting the several securities, and also for preparing and enrolling a memorial of such securities in the High Court of Chancery by the grantor for paying such additional premium of insurance as might be incurred in case of his going upon, or into parts beyond the seas. He founded his motion on an affidavit, which stated that the annuity was granted on the 21st *January*, 1819, that the plaintiff had contracted with the defendant *Perrott* as the principal, and the other two as his sureties, for the purchase of an annuity of 70*l.* to be paid to the plaintiff during the life of the defendant *Perrott*, at the sum of 490*l.* That it was agreed on the purchase of the annuity, that the latter sum should be wholly paid to the defendant *Perrott*, who should thereout pay all the costs and charges of preparing and perfecting the several securities for the same, and also of preparing and perfecting a memorial in the High Court of Chancery. That in the deed granting the annuity was contained a covenant that the defendant *Perrott* should not at any time during the continuance of the annuity, go upon the seas, or parts beyond them, without first giving the plaintiff seven days' notice in writing of such his intention, in order to enable him to pay such additional premiums of insurance as might be incurred on account thereof, which additional premiums the defendants covenanted to pay to the plaintiff. That no notice was taken in the memorial, either of the agreement by the grantor to pay the costs of preparing and perfecting the several securities, and enrolling the memorial, or of the covenant by him for paying such additional premiums as might be incurred in case of his going upon the seas, the memorial only stating in the column "Consideration, and how paid," 490*l.* in notes of the Governor and Company of the Bank of *England*, expressed to be payable to the bearer thereof on demand; and

in the column—"Amount of annuity or rent-charge," 70*l.* a-year.

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Mr. Serjt. *Pell* and Mr. Serjt. *Bosanquet* now shewed cause. The principal, if not the sole objection in this case is, that the memorial does not state the provision contained in the deed under which the grantor was to pay an additional premium in the event of his going abroad. But the memorial is framed in compliance with the statute 53 *Geo. 3. c. 141.* by which the 17 *Geo. 3. c. 26.* is repealed, except so far as regards annuities which were granted before the passing of that latter statute. The second section of the 53 *Geo. 3.* regulates the form of the memorial, and enacts, that "within thirty days after the execution of the deeds whereby any annuity shall be granted, a memorial of the date of every such deed, of the names of all the parties, and of all the witnesses thereto, and of the persons for whose lives such annuity shall be granted, and of those by whom the same is to be beneficially received; the pecuniary consideration for granting the same, and the annual sums to be paid, shall be enrolled in the High Court of Chancery, in a particular form as therein expressed, with such alterations therein as the nature and circumstances of any particular case may reasonably require." That has been fully complied with in the present instance. But, it is sought that the annuity itself may be set aside, the Court however have no jurisdiction to do so, for by the sixth section of the 53 *Geo. 3.* they are only authorised to order the deeds to be cancelled, and the judgment vacated. The provision in question could not be expressed in either of the heads as stated to be required in the memorial, as they merely relate to the date and nature of the instrument, the names of the parties, witnesses, and persons by whom the annuity is to be received, and for whose life it is granted. All this has been regularly done, and the consideration is expressed to have been 490*l.* in Bank of *England* notes, and the amount of the annuity

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70*l.* a-year. Whether the grantor went abroad or not, can form no part of the consideration, and consequently there is no defect whatever on the face of the memorial. If the statute were to receive the construction contended for by the present defendants, it would tend to numberless difficulties and inconveniencies, as every trivial covenant must be set forth on the face of the memorial. Besides, by the fifth section of the 53 *Geo.* 3. copies of the deeds securing an annuity may be obtained by the grantor, on twenty-one days notice being given to the grantee. The provision in question cannot be considered to fall within the description of a rent-charge, for the annual sum payable is stated to be 70*l.* Clauses of this nature have been usually introduced in annuity deeds long before and since the 53 *Geo.* 3. was passed, and have never been noticed in the memorial. If, therefore, this application were to prevail, it would equally affect all other annuities granted since the passing of that act. Whether the additional premium may be payable or not, rests wholly on contingency, and can form no part of the consideration for which the annuity was granted. Besides, it is at the option of the grantor whether he will insure on leaving the country or not; if he neglects to do so, no additional premium is to be paid by the grantee.

Mr. Serjt. *Lens*, in support of the rule. The substance of the objection is, that a material part of the contract affecting the pecuniary interest of the parties, is not set forth in the memorial under either of the columns, which are arranged and pointed out by the statute. It should have been inserted either under "the consideration" or "the amount of the annuity," as it was not the case of a mere common annuity. By the second section of the 53 *Geo.* 3. the form of the memorial is set out, and it is expressed, that it must be enrolled in conformity thereto, with such alterations therein as the nature and circumstances of any particular case may reasonably require. Every material circumstance, therefore,

should be expressed, and it is quite clear, that the provision in question might have the effect of varying the amount of the annuity. Perhaps, therefore, it would have been more consistent to have ranged it under that column, although it might also have fallen under that of the consideration. Indeed, it might have been more prudent to have inserted it under both columns, as a memorandum, to shew that this was not the case of a common annuity. There is no doubt but that this would have been a fatal objection under the 17 Geo. 3. c. 26. as under that statute, all the *res gesta* were required to be stated in the memorial (a). It is no answer to say, that it rests in contingency, because it is beneficial to the parties, and in the event of the grantor's going abroad, he is bound to pay more than 70*l.* a-year, as he would thereby incur the expence of an additional premium to be paid by the grantee. Such premium would be regulated according to the journey the grantor intended to take, and if neither of the columns as required to be filled up in the memorial are applicable to this case, the covenant should at all events have been introduced therein as a memorandum, as circumstances not only require it, but the memorial does not on the face of it embrace the whole transaction between the parties.

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Lord Chief Justice DALLAS.—As I was not in Court when this application was made, I shall deliver the opinion I have formed with great diffidence, and more particularly so, as it embraces an entirely new question. Its object is to set aside the securities on which this annuity was granted, on the ground that the memorial does not state a provision in the deed, by which the grantor covenanted to pay such additional premium as might be incurred, and which was to be paid by him to the grantee in case of his going abroad. The only question is, whether it was necessary that this should be specified in the memorial. That will depend on the con-

(a) See *verba* Lord Kenyon in *Cummins v. Isaac*, 8 Term Rep. 184.

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struction to be given to the 53 *Geo. 3. c. 141.* by which it is enacted, that "within thirty days after the execution of the deeds whereby any annuity shall be granted, a memorial of the date of every such deed, of the names of all the parties, and of all the witnesses thereto, and of the persons for whose lives such annuity shall be granted, and of those by whom the same is to be beneficially received, the pecuniary consideration for granting the same, and the annual sum to be paid, shall be enrolled in the High Court of Chancery, in a particular form as therein expressed, with such alterations therein as the nature and circumstances of any particular case may reasonably require." The two latter columns in that form, require the "consideration, and how paid," and "the amount of the annuity or rent charge" to be set out. It has been contended, that the agreement by the grantor to pay an additional premium, and to which he would be liable in case of his going beyond the sea, either constitutes part of the consideration, or must be taken as part of the amount of the annuity or rent-charge to be paid by him to the grantee. It is quite clear that the object of 53 *Geo. 3.* as well as the 17 *Geo. 3. c. 26.* was to guard against fraud, and that it was therefore necessary to set out the sum actually paid for the annuity on the one hand, and the amount of the annuity on the other. Here, it is stated, that the sum paid was 490*l.* in Bank of *England* notes; and that the amount of the annuity was 70*l.* a-year. Both these are pecuniary payments. Is any thing collateral or contingent to be considered as part of the consideration, or of the annuity itself? It seems to me, that it cannot, on the reasonable construction of the statute. The grantee may or may not be put to any expence on the grantor's going abroad; it does not increase the value of the annual sum he is to receive. The consideration to be expressed, must be confined to the sum paid for the annuity; and the statute points out how the consideration must be stated to have been paid, *viz.* 100*l.* in money, and 500*l.* in Bank of *England* or other notes, or bills of exchange,

is the case may be. Besides, the statute is confined to pecuniary considerations. It is therefore quite clear that the clause in question cannot fall under a consideration of that description. By the sixth section of the statute it is provided, 'that if any part of the consideration shall be returned to the person advancing the same, or any part of it shall be paid in notes, which shall not be paid when due, or cancelled, without being first paid; or if such consideration is expressed to be paid in money, but the same or any part of it be paid in goods; or retained on pretence of answering the future payments of the annuity, it shall be lawful for the person by whom the annuity is made payable, to apply to the Court in which any action shall be brought for the payment of the annuity, by motion to stay the proceedings; and if it shall appear to the Court that such practices have been used, they may order the deeds to be cancelled.' That clause confines the consideration to something to be given or paid in notes, money, or goods, and points out in what cases proceedings against the grantor may be stayed, in case it be returned or retained. Taking that clause and the first section of the act and the schedule thereto annexed, together, it appears to me, that the consideration, and the amount of the annuity must be confined to the sum actually paid, and the annual value of the annuity; and more particularly so, as only the pecuniary consideration for granting the same, and the annual sum to be paid, are required to be set out in the memorial. The object of the Legislature in passing the statute, was to remove obstructions and difficulties which had before arisen, and it must receive a beneficial construction. The covenant by the grantor forms no part of the consideration of the price or amount of the annuity, as it was optional with him to insure or not, and the grantee was to receive no benefit himself from the payment of the additional premium, the amount of which would depend not only on where the grantor was going, but whether he went in the time of peace or war.

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Mr. Justice PARK.—I should have had no hesitation whatever in giving my opinion on this question, had it not been stated to have arisen for the first time, when the application was made, and that it depended on the construction to be given by the Court to the 53 *Geo. 3. c. 141*. I now perfectly concur with my Lord Chief Justice in the view he has taken of it. The obvious intention of the Legislature in passing that statute, was to prevent fraud, and relieve persons from difficulties which had before occurred from the numerous decisions on the 17 *Geo. 3. c. 26*. Those cases are now done away with, and are wholly beside the present question, but I confess I think the Courts went too far on the construction they put on some parts of the latter statute. By the 53 *Geo. 3.* the pecuniary consideration is required to be enrolled in the memorial; and the sixth section is intended to guard against frauds, in case of any part of the consideration being returned to, or retained by the person advancing the money, or in case notes given for the same shall not be paid when due, or any part of it be paid in goods. Besides, by the schedule, the consideration must be expressed, and how paid. That does not confine it to money only, but to what is equivalent to, or passes for such, as the case may require. The words "how paid," mean that the consideration must have been paid at the time of the enrolment, which must be made within thirty days after the annuity was granted, and cannot apply to any additional sum that may be payable on a contingency thereafter. The covenant in question seems to me to be properly inserted in the deed. The amount of the annuity is expressly stated to be 70*l.* a-year, but if the grantor go abroad, an additional premium would be required. At the time the annuity was granted, it does not appear there was any prospect of his leaving this country, and yet it has been insisted, that it should have been stated in the memorial. How could it be, when it rested entirely on contingency? It could not be ascertained what premium might be necessary, for if he went

to the *East Indies*, more would have been required than if he merely set sail for *France*. It appears to me, therefore, that the Legislature, when they passed this act, only looked to existing circumstances, and that the retaining of part of the consideration, as mentioned in the sixth section, was only meant to apply to any part that might be retained at the time the consideration was paid. On these grounds, I am of opinion, that the covenant in question need not have been noticed in the memorial.

Mr. Justice BURROUGH declined giving any opinion, as he was related to one of the parties.

Mr. Justice RICHARDSON was absent,

Rule discharged.

GIGNER v. BAYLY and Wife.

Saturday,  
Nov. 18.

THE plaintiff had purchased an estate at auction, and by the conditions of sale, the defendants were to make out a good title within a certain time, if not, the purchase-money was to be returned. He accordingly signed the conditions, and left a deposit with the auctioneer, which had been returned to him, as the defendants were unable to make out a good title, on which the plaintiff commenced the present action for interest (a) for the sum so deposited, the defendants having refused to allow it.

Mr. Serjt. *Vaughan*, on a former day in this Term, had obtained a rule *nisi* that the defendants, or their agent, might produce the contract on which this action was brought, for

(a) See *Farquhar v. Farley*, ante, vol. i. 322. *Lee v. Munn*, id. 481.

that the latter must produce such contract for the purpose of the plaintiff's inspecting it, or getting it stamped.

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Where the plaintiff entered into a contract with an auctioneer for the purchase of land by auction, and made a deposit in part of the purchase-money, and afterwards brought an action against the defendants (the vendors) for interest, for not completing the purchase according to the conditions of sale:—Held,



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the purpose of the plaintiff's inspecting it, or getting it stamped, to be given in evidence at the trial.

Mr. Serjt. *Lens* now shewed cause, and insisted, that as the contract was made with the auctioneer, who was merely an agent for the defendants, they were not bound to produce it.

But the Court held, that as it appeared there was only one contract entered into at the sale between the plaintiff and the auctioneer, it would fall within the general rule, and they referred to the case of *Goater v. Nunnely* (a), where there was a dispute between the plaintiff, a factor in *Smithfield*, and the defendant a grazier; and the Court required the plaintiff to produce at the trial, the several books wherein he entered the accounts of beasts sold, and of monies received on the defendant's account; and they observed, that in *Street v. Brown* (b), it appeared that the instrument consisted of two parts. Besides, here, the plaintiff must be nonsuited without the production of the contract, as his cause of action depends entirely upon it.

Rule absolute (c.)

(a) 2 Stra. 1130.—(b) 1 Marsh. 610. S.C. 6 Taunt. 302.  
(c) See *Morrow v. Sanders*, ante, vol. iii. 671. *Bateman v. Phillips*, 4 Taunt. 157.

Monday,  
Nov. 20.

DALY v. BROOSHOFTE.

Bail rejected  
on the ground  
of his being  
one of the  
turnkeys of  
the King's  
Bench prison.

ONE of the turnkeys of the King's Bench prison came up to justify as bail in this case, when

Mr. Serjt. *Onslow* opposed him, on the ground that he must be considered as falling within the rule *Michaelmas*, 6 Geo. 2. reg. 7, by which it is ordered, that "no sheriff's

officer, bailiff, or other person concerned in the execution of process, shall be suffered to become bail in any action or suit depending in this Court."

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The Court referred to the case of *Faulkner v. Wise* (a), where it was held not to be a sufficient ground for rejecting a person as bail, that he was described as being "of A. in the county of B. gaol-keeper," as it did not appear that he was the county gaol-keeper, but that he might merely have been a corporation gaol-keeper,—and they observed, that a turnkey of the King's Bench prison had as much to do with the process of the Court as a sheriff's officer, and therefore that the rule of 6 Geo. 2, applied to him as well as to the keeper of the Poultry Compter (b), and Marshalsea Court officers (c). Besides, it very frequently happens, that persons are turned over from the custody of the Warden to the Marshal of the King's Bench. In *Faulkner v. Wise*, the bail was about to justify by affidavit, and the Court might presume that he was a corporation gaol-keeper. In *Bolland v. Pritchard* (d), a person merely employed to summon juries was rejected, as being a sheriff's officer within the letter of the first part of the rule.—The Court however permitted the other bail to justify, and gave two days time for another to be brought up in lieu of the turnkey, who was

Rejected.

(a) 2 Bos. & Pul. 150.—(b) 2 Doug. 466.—(c) Tidd's Practice, 7th edit. 271.—(d) 2 Sir W. Bl. 799.

DOE, on the demise of PEARSON v. ROE.

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MR. Serjt. Peake moved for judgment against the casual ejector in this cause, on an affidavit, which stated, that  
Where several tenants had been duly served with a copy of a declaration in ejectment, judgment may be entered against the casual ejector, although the notice at the foot of the declaration was not addressed to any or either of such tenants.

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there were several tenants in possession,—that they had all been duly served with a copy of the declaration before the essoign day, and acknowledged such service; but it appeared that the notice at the bottom of the declaration was not addressed to either of them individually or collectively.

The Court however granted the application.

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HANDFORD v. PALMER.

A declaration in *assumpsit* stated, that in consideration that the plaintiff, at the request of the defendant, would lend a horse of his to be used by the latter for a given time, the defendant promised to take proper care of him, and return him to the plaintiff in as good a condition as he was in at the time of the promise, or pay the plaintiff fifteen guineas. It was proved at the trial, that in addition to these terms the contract was, that the defendant should find the horse meat for his work :—Held, that this was no variance, as the contract was sufficiently stated in the declaration, and as the law would imply that a person who hires a horse is bound to provide him with food, unless there be an agreement to the contrary.

THIS was an action of *assumpsit*. The first count of the declaration stated, that in consideration that the plaintiff at the request of the defendant, would lend and deliver to him a certain horse of the plaintiff's, of the value of 15*l.* 15*s.* to be used by the defendant from the 10th *November*, 1819, until *Lady Day* then next following, the defendant promised the plaintiff to take proper care of the horse, and that he would return him to the plaintiff on *Lady Day* then next, in as good a condition as he was in at the time of making the defendant's promise, or that he on failing so to do, would pay the plaintiff the sum of 15*l.* 15*s.* The plaintiff then averred, that on the 10th *November*, 1819, he lent and delivered the horse to the defendant on the terms aforesaid, who took and received the same, and assigned for breach, that the defendant would not take proper care of the horse, nor on the *Lady Day* next after the making of his promise, return him to the plaintiff in as good a condition as he was in at the time of making the promise, or pay the plaintiff the said sum of 15*l.* 15*s.* or any part thereof, but that on the contrary

thereof, on the *Lady Day* next after the making of the defendant's promise, he returned the horse to the plaintiff in a much worse condition than the same was in at the time of the delivery thereof to the defendant. There were other counts varying the terms on which the horse was to be lent, and the common money counts. The defendant pleaded the general issue.

At the trial of the cause before Mr. Justice *Burrough*, at the last assizes for *Somerset*, the witness who proved the contract, stated, that at the time of the delivery of the horse to the defendant, the plaintiff said to him, "Recollect, I am going to let you have this horse till *Lady Day*, his meat for his work." On this, the counsel for the defendant objected to the declaration, on the ground of a variance between the contract as laid and proved. The learned Judge, however, over-ruled the objection, stating, that he did not consider the words "meat for his work" to form an essential part of the contract. The Jury accordingly found a verdict for the plaintiff, but leave was given the defendant to move to set it aside, in case they should be of opinion that the objection was well founded.

Mr. Serjt. *Lens*, having on a former day in this Term, accordingly obtained a rule *nisi*, that this verdict might be set aside, and a nonsuit entered, on the ground that the whole of the consideration was not stated in the declaration, as part of the bargain was, that the defendant was to provide the horse with food for his work, which implied, that nothing was to be paid for his hire during the time of the loan:—

Mr. Serjt. *Pell* now shewed cause. The contract is substantially set out in the declaration, and according to its legal effect. The defendant, in consideration of the loan of the horse, undertook to return him to the plaintiff in as good a condition as he was in when the promise was made.

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That is equivalent to a promise to feed him, for the lender was not bound to provide him with meat. At all events, it must be implied, that the defendant was bound to take care of him, if nothing to the contrary was specified. If nothing had been said as to the keep, it is quite clear the defendant could not call on the plaintiff for it, during the time he used the horse, and consequently, there is no variance between the contract as laid and proved at the trial.

Mr. Serjt. *Lens* in support of the rule. It was part of the consideration of the contract, that the defendant who was to have the convenience and use of the horse, should provide him with food for his work, and as that was not stated in the declaration, it does not appear whether the plaintiff or defendant was to feed him. The terms of the contract as to the keep, are left ambiguous, though there was an express stipulation between the parties. Although it may be implied by law, that the borrower of a horse is bound to maintain him, still, here there was an express contract that the defendant was to find him meat for his work, which forms a substantial part of the consideration on which he was lent by the plaintiff to the defendant.

Lord Chief Justice DALLAS.—The defendant in this case was bound to return the horse in good condition, at the expiration of the time for which he was lent. That would depend chiefly on whether he was properly fed or not. The rule is, that every contract must be proved as laid, and, the declaration must state the contract on which the action is founded, truly and correctly, that is, either in the substance or terms in which it was made, or according to the legal effect and operation of those terms. In *Wangh v. Busse* (a) Lord Chief Justice Gibbs said, that “when you declare on a deed, you state the legal effect of it; and that

(a) 1 Marsh. 217.

one might declare without using a word which is contained in the deed, except the names of the parties and the sum." Here, therefore, the only question is, whether the contract is set out in the declaration according to its legal effect. It is stated, that in consideration that the plaintiff would lend his horse to the defendant until *Lady Day*, he would return him in as good a condition as he was in at the time of the loan, or pay fifteen guineas; and the breach assigned is, that he had neither returned him in such good condition, nor paid that sum. With respect to what the law might imply, nothing appearing contrary to the contract as laid in the declaration, although there might be a different contract, still, where on the loan of a horse the borrower promised to return him in a good condition, the presumption is, that the party hiring must pay for his keep, unless something is said to the contrary at the time. Independently of this, the rule in framing a declaration on an agreement which consists of several distinct parts and collateral provisions, is, that it is not necessary to state in the declaration, every part of such agreement;—it is sufficient to state so much of it as contains the entire consideration for the act which is to be done by virtue of such consideration. So, where the plaintiff states the whole consideration truly, and then sets forth those parts of the defendant's promise, for the breach of which he complains, truly and correctly, it is sufficient, without stating other parts of the promise irrelevant to the breach complained of. Here, the breach was, that the defendant did not return the horse in as good condition as he was in at the time he was lent, nor pay the sum he undertook to pay if he should not be so returned. That, therefore, is sufficient to entitle the plaintiff to recover, for he does not complain that his horse has not been fed, or properly kept, but that he was not returned by the defendant in as good a condition as he ought to be. I am therefore of opinion, that this is not a variance, and consequently that the verdict for the plaintiff must stand.

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Mr. Justice PARK.—I perfectly coincide with my Lord Chief Justice as to the rule to be adopted in setting out the obligatory parts and nature of a contract only, and that the breach need only be co-extensive with the promise. In *Cotterill v. Cuff* (a) it was held, that it was sufficient if the declaration shewed so much of the terms beneficial to the plaintiff in a contract, as comprehends the point for the failure of which he sues. So, in *Tempest v. Rawling* (b) Lord Ellenborough said, “that it was enough to state that part truly which applies to the breach complained of, if that which is omitted do not qualify that which is stated.” Here, the contract appears to be truly stated, as far as applies to the breach, viz. that the defendant did not return the horse in as good a condition as he was in when the promise was made, which appears to be the undertaking of the defendant, on which the consideration was founded.

Mr. Justice BURROUGH.—I had no doubt at the trial, but that the contract was sufficiently stated in the declaration, still, I reserved the point for the consideration of the Court, as I forbore there to give any opinion as to what the general intendment of the law might be. Here, it implies that the defendant should feed the horse, for he was under an obligation not only to keep him during the time of the hire, but to return him in as good a condition as when he received him. How could he comply with that undertaking unless he fed him? and it is quite clear he could not maintain any action against the plaintiff for his keep.

Mr. Justice RICHARDSON.—The objection raised to this declaration is, that the plaintiff has not set out all the defendant undertook to do, viz. to find the horse meat for his work. The breach is not founded on that part of the contract, and I therefore think it was not necessary to set it out. Neither does it appear, that the obligation of the

(a) 4 Taunt. 285.——(b) 13 East, 20.

defendant to feed the horse formed any part of the consideration. If the plaintiff had agreed to lend the horse, and provide him with food, it would have been necessary to have stated it, but he declared, that in consideration that he would, at the defendant's request, deliver and lend him a horse, to be used by him for a given time, he promised to take proper care of him, and return him to the plaintiff in as good a condition as he was in at the time of the lending, or that in failure to do so he would pay fifteen guineas. If a person lends a horse to be used by another, the law will imply an obligation on the borrower to provide him with food during the time of his use, unless there be an agreement to the contrary. But here, it is expressly stated, that the defendant promised to take care of him and return him in a good condition, or pay a certain sum, and it is inconsistent to suppose that he could take proper care of him, unless he provided him with sufficient food.

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Rule discharged (a).

(a) See *Miles v. Sheward*, 8 East, 7.

PEACOCK v. PURVIS.

Tuesday,
Nov. 21.

THIS was an action of replevin, for taking the plaintiff's growing crops, consisting of standing barley, oats, and wheat, on the 24th *August*, 1819. The defendant made cognizance, first, as bailiff of Sir *Francis Blake* for 200*l.* being the amount of half a year's rent due to the latter from one *William Peacock*, on the 12th *May*, 1819. The second cognizance stated the amount of the rent to be 500*l. per annum*; and the third and fourth were founded on the statute 8 *Anne*, c. 14. stating the distress to have been made within six calendar months after the determination of the demise, and during the title of Sir *Francis Blake*. Pleas in bar as to

A distress on growing crops of corn of the vendee of the sheriff for rent accruing due to the landlord subsequently to the entry under the execution and sale, cannot be sustained, unless such vendee allow the crops to remain uncut, an unreasonable time after they become ripe.

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the first cognizance, that *William Peacock* was not tenant to Sir Francis; Secondly, that the plaintiff in Hilary Term, 59 Geo. 3. recovered a judgment against *William Peacock*, for 1000*l.* damages, and eighty shillings costs, and that on the 12th *February* in the same year, he sued out a *fieri facias*, returnable on *Wednesday* next after three weeks of *Easter*, which was delivered to the sheriff on the 27th *April*, under which he seized the corn in the declaration mentioned in execution on the 28th. That the plaintiff after the execution, and before the removal of the corn, to wit, on the 30th *May*, paid Sir Francis Blake one year's rent, and that the sheriff afterwards sold the corn to the plaintiff, for the purpose of levying the monies under the writ, and accordingly levied the same, and that the plaintiff thereby became possessed of the corn, &c. which was at the time when the distress was made, unripe and unfit to cut, and not in a proper state to be carried and taken away. To this plea there was a general demurrer and joinder.—The plaintiff pleaded similar pleas to the second cognizance:—and to the third and fourth; first, that *William Peacock* did not hold as tenant to Sir Francis Blake; secondly, that the said *William Peacock* was not in possession; and, thirdly, a custom for a way-going crop; and he afterwards pleaded the judgment, execution, sale, and payment of rent, as in the second plea to the first cognizance above set forth.

The cause came on for argument this day, when

Mr. Serjt. *Hullock*, in support of the demurrer, observed, that the question was, whether growing corn which had been seized under a writ of *fieri facias*, was liable to be distrained by the landlord for rent accruing subsequently to the seizure and sale under such writ; and after the sheriff had quitted possession of the premises, and before the corn was in a fit state to be cut and carried away. He submitted, first, that the plea was bad in substance, as the plaintiff's title to the corn in question could not be established without

a contract in writing, and that such contract ought to have been shewn on the face of the plea. The corn being growing at the time of the sale to the plaintiff, was an interest in land, and could only be transferred to him by an agreement in writing, according to the 29 Car. 2. c. 3. s. 4. and he cited the cases of *Emmerson v. Heelis* (a) and *Crosby v. Wadsworth* (b) to shew, that on the sale of a growing crop of turnips, or grass, a written contract is required by that statute. There is a distinction as to the necessity of setting out a contract relating to lands, in a declaration or plea; in the former, the plaintiff need not shew the thing to be in writing, but in the latter it must be so pleaded. As, where the defendant pleaded that another person, for a good consideration, promised to be answerable to the plaintiff for the debt for which the action was brought, it was held, that it must be shewn to be in writing, so that it might appear to be a contract which the plaintiff could enforce (c). And although on such an agreement the plaintiff need not set it forth to be in writing, yet, where the defendant pleads it in bar, he must plead it so as it may appear to the Court that an action will lie upon it, *Case v. Barber* (d). Here, the plaintiff would have been required to make out his proof as if the corn had been sold him by an individual, and he should therefore have stated his title *in omnibus*, and more particularly so, as the contract could only have been established by a memorandum in writing, which should have appeared on the face of the plea.—[Mr. Justice Burroughs. —The defendant might have taken issue as to the sale. But assignments of terms of years are generally pleaded without setting forth that such terms were assigned by deed or writing (e).]—It must be admitted, that growing corn of this description may be taken in execution under a *fiery facias*, and although it may be properly sold under that writ, still, the question is, whether either by statute or common law, a

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(a) 2 Tannt. 38. — (b) 6 East, 602. — (c) 1 Wms. Saund. 276, n. 2. — (d) Sir T. Raym. 450. — (e) See 1 Wms. Saund. 234, n. 3.

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protection would be afforded to a purchaser at such sale, against a subsequent distress by the landlord for rent; and more particularly so, when such purchaser is subject to all the legal liabilities which attach to a sale of this description. It makes no difference that the sale took place under an execution, for although the corn might be considered as in *custodiâ legis* at the time, still, such custody ceased immediately on the completion of the sale, and the sheriffs' quitting the premises. It must be inferred, that the plaintiff in this case, knew the corn in question might be liable to a subsequent distress for rent at the time he purchased it, for it was not like an article in the hands of a manufacturer for the benefit of trade, and it is quite clear that it would have been liable to such distress, but for the previous sale under the execution. This, too, was a way-going crop, and there is no distinction in point of law, whether it were sold to the purchaser by the tenant, or the sheriff. Its value was uncertain at the time of the sale. At the common law, growing corn was not liable to a distress for rent, but now by 11 Geo. 2. c. 19. s. 8. (a) landlords may seize, cut, and appraise it, and it is therefore placed on the same footing as other goods and chattels on the premises of a tenant, which before the passing of that statute were distrainable for rent. What, therefore, is to prevent the operation of this statute in the present instance? Clearly, not the circumstance of the corn's being incapable of removal at the time of the sale, for in *Parslow v. Cripps* (b) it seems to have been admitted, that where corn is taken in execution, and sold by the sheriff, and the vendee permits it after severance, to lie on the ground, it is distrainable for rent; although that case was not solemnly decided. So, in *Eaton v. Southby* (c) the same question was intended to be raised as in this case, and it was objected, that although growing corn had been legally taken in execution, yet, that it having been suffered to

(a) See ante, vol. ii. page 493.—(b) 1 Com. Rep. 2d edit. 204.
 (c) Willes, 131.

remain on the land, it was liable to be distrained for rent; and Lord Chief Justice *Willes*, in delivering the judgment of the Court, observed, as to this objection (a) "that it might have required very good consideration, it being a point of great consequence, but that there was no occasion to enter into it, as the Court were clearly of opinion, that if there had been no execution, the corn could not be distrained, as, if the estate of a tenant at will be determined either by his death or by the act of the landlord, he or his executors may reap the corn sown by him; and such corn, though purchased by another person, cannot be distrained in case of the death of the tenant at will, for rent due from a subsequent tenant." A writ of error was afterwards brought in that case, but it does not appear that any judgment was given, or that the present question was at all touched on. But in *Gwilliam v. Barker* (b) it was decided, that a sheriff taking corn in the blade under a *feri facias*, and selling it before rent due, is not liable to account to the landlord of the defendant under the statute 8 *Anne*, c. 14. for rent accruing subsequently to the levy and sale, although notice was given, and though the corn was not removed from the premises until long afterwards, when a considerable portion of rent had become due;—and Lord Chief Baron *Thompson* there said (c), "I really see no reason why the landlord should not have distrained the corn, the execution was executed, and the goods of a stranger were remaining on the premises. His remedy should have been by distress." That *dictum* is expressly in point, and the seizure in that case was similar to the present; and in *Blades v. Arundale* (d) it was decided, that if a sheriff's officer quit possession after the execution of a *feri facias* and seizure under it, the goods are liable to be distrained by the landlord for rent, as if the writ had never been executed. Here, if the landlord were not empowered to distrain, the tenant might defraud him of the rent for his way-going crop. It was im-

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(a) *Willes*, 136. — (b) 1 *Price*, 274. — (c) *Id.* 277. —
 (d) 1 *Maul. & Selw.* 711.

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possible to ascertain its value at the time of the sale, and it was left to ripen and come to maturity on the soil of the landlord, and he might be deprived of all remedy against his tenant, if the latter were suffered to collude with a fictitious creditor, who might have the crops transferred to him under an execution, founded in fraud. In *Poolé's* case (a) it was held, that where a tenant for years hath an interest in standing corn, the sheriff may cut it down and sell under a *feri facias*. And in *Sir William Harbert's* case (b) it was resolved, that at the common law, where a person sues a recognizance for debt or damages, he should not have the body of the defendant nor his lands (unless in special cases) in execution, but that he should have execution only of his goods and chattels, and of corn, and the like present profit which shall grow upon the land, either by a writ of *levari* or *feri facias*. But these cases were decided previously to the statute 11 Geo. 2. On these grounds, therefore, the defendant is entitled to judgment.

Mr. Serjt. *D'Oyley*, *contrà*.—As to whether the contract between the plaintiff and the sheriff should have been in writing and set out on the face of the plea, is wholly beside the present question, for the main, if not the sole point is, whether the corn which had been sold under the *feri facias*, was, under the circumstances, liable to be distrained by the landlord for rent, which became due after such sale. It will be impossible for any person to make a purchase under a writ of this description, if the sale in question shall be deemed invalid. A purchaser at such sale, cannot know at what time rent will become payable to the landlord, and it is quite clear he would not buy, unless he was assured that he should reap the fruits of his purchase. If the corn had been *bonâ fide* sold by the tenant, it would be begging the question to say, that it would be afterwards liable to a distress. There is a wide distinction between the

(a) 1 Salk. 368.—(b) 3 Rep. 11. b.

cases of a tenant and the vendee of the sheriff; the latter is a complete stranger to the title of the landlord; and in *Doe, d. Mitchinson v. Carter* (a) it was held, that an assignment to a person purchasing a term from the sheriff under a *bonâ fide* execution, would not amount to a forfeiture of a lease, but that it would do so, where the execution was in fraud of the covenant. Here, the plaintiff was not guilty of laches, by allowing the corn to remain on the premises, for he was not bound to remove it until it was ripe, and in a fit state to be carried away. Although, after the return of the writ and sale, and the sheriff had left the premises, the crops might not be strictly in *custodiâ legis*, still, they must, in point of principle, be so considered, as the object of the proceeding under the execution by the sheriff was to satisfy a judgment creditor, who will be deprived of all protection afforded him by the sale, if the claims of the landlord are afterwards allowed to intervene, and deprive him of his right. The sheriff merely interfered for the purpose of satisfying a demand due from the debtor to his creditor. The property must then be considered as under the immediate protection of the law, and under which the vendee made his purchase. If the landlord could not distrain the crops while they remained in the hands of the sheriff, neither can he be entitled to do so during the time they continued in the possession of the purchaser under a *bonâ fide* sale from such sheriff. Previously to the statute 8 *Anne*, c. 14. if goods of the tenant were taken and sold under an execution, the landlord had no remedy for the rent then due to him, but it was provided by that statute, that no goods should be taken in execution, unless the party at whose suit it was sued out, should, before the removal of the goods, pay the landlord the rent due, provided the arrears did not amount to more than a year's rent. So, before the 11 *Geo. 2. c. 19.* growing crops could not be distrained. Wherever a landlord has been allowed to distrain goods sold under an execution,

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(a) 8 Term Rep. 57. 300.

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the purchaser has left them on the premises, and omitted to remove them within a reasonable time. But here, the plaintiff, as purchaser, was obliged to leave the corn on the land to ripen. He, therefore, was not bound to remove it until the time of harvest. If he cut it when it was unripe, it would neither satisfy the creditor of the tenant, nor pay the rent due from the latter to his landlord. At the time the sale was made, the landlord had been satisfied the rent due to him, and the remainder of the purchase-money was paid to the judgment creditor. Both, therefore, were satisfied, from the payment made by the plaintiff as purchaser at the sale, and after he had paid the purchase-money, he must have concluded that the crops were *bonâ fide* his property, and that they could not afterwards be taken from him. It would be most unjust if the landlord should now be deemed entitled to distrain, after the rent due to him at the time of the sale had been fully satisfied and paid by the plaintiff. No previous decision is applicable to the present question, for although *Eaton v. Southby* appears to be the leading case, still, it steers quite clear of this, as the question there raised, as to whether corn taken in execution could afterwards be distrained, although noticed by the Court, was not decided, as their judgment turned on the point, that the emblements of an off-going could not be distrained for the rent of an incoming tenant. There, too, it was said, that a tenant at will or his representatives had free liberty of ingress, egress, and regress to come upon the land and to cut and carry away the corn; and *Littleton (a)* was cited in support of that position. So, here, the plaintiff as purchaser under the execution, had an equal right, for the distress was made on the tenant in the first instance. The case of *Parslow v. Cripps* rests on argument only, and therefore cannot be relied on as a decision. The *dictum* of Lord Chief Baron Thompson, in *Gwilliam v. Barker*, although it may appear unfavourable to the plaintiff, was wholly extra-judicial. Besides, there, no rent

(a) Sec. 68.

had been paid to the plaintiff at the time of the sale under the execution. At all events, the landlord's claim must be confined to rent due to him at the time of taking the goods, and not to that which may accrue afterwards;—for in *Hoskins v. Knight* (a) it was decided, that a landlord is only entitled to interpose a claim for rent actually due at the time of the taking the goods in execution. The case of *Blades v. Arundale* is inapplicable to the present, as there, the question turned on the seizure of goods in a house, and the sheriff had not proceeded to a sale, and it merely established that they were not in *custodia legis*, so as to enable him to maintain trespass against the landlord, who afterwards distrained the goods for rent, as the sheriff had relinquished the possession by his officer having quitted the premises after the seizure, and before the writ was executed.

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Mr. Serjt. *Hullock*, in reply.—It has been said, that no one would purchase crops of this description under an execution, unless he be entitled to receive all the fruits of such purchase; but the price was regulated according to the contingencies to which they were afterwards liable, and the plaintiff should have taken care whether he purchased at a loss or not. He was bound to take away the property as soon as he had acquired a title to it by the sale, and it makes no difference whether he purchased from the tenant or under the execution. When the sale took place, a year's rent was in arrear from the tenant to his landlord;—and his brother, the plaintiff, purchased the crops in question. No distinction, therefore, can be drawn between this and a *bonâ fide* purchase. The case of *Doe, d. Mitchinson v. Carter* is distinguishable from the present, as it turned on the question whether an assignment by operation of law under a *bonâ fide* execution, or an execution in fraud of the covenant operated as a forfeiture or not. Executors and assignees of bankrupts take by operation of law, and yet, goods in their possession

(a) 1 Maul. & Selw. 245.



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may be distrained by the landlord for rent due from their testator, or the bankrupt. But here, the plaintiff did not come in by operation of law, for there is no difference between property in the possession of a third person, or under an execution: For though the sheriff may sell by the operation of law, the purchaser must take under his contract. Although *Eaton v. Southby* was determined on a different question from the present, the doctrine there laid down is in favour of the defendant; and in *Blades v. Arundale*, it was held, that goods seized under an execution, could not be protected after the sheriff had relinquished their possession. The same principle is applicable to growing corn, which may be protected from distress as long as it continues in the possession of the sheriff; besides, the *dictum* of Chief Baron *Thompson* appears to be not only in point, but founded on reason and legal principles, and consequently the distress in question can be clearly maintained.

Lord Chief Justice DALLAS.—Although the question in this case is not altogether new, there are certainly no decisions expressly in point, but different cases have been referred to in the course of the argument; the first of which, in point of date, is that of *Eaton v. Southby*, and the last, that of *Gwilliam v. Barker*, containing the *dictum* of the late Lord Chief Baron *Thompson* which has been so much relied on for the defendant. I shall therefore shortly advert to these cases, before I proceed to investigate how the present stands in point of principle, and on which it must ultimately turn. In *Eaton v. Southby* the question now before the Court was not decided, although a similar point was raised for their consideration, because it appears, that on the facts of that case it became unnecessary to decide it. But it certainly seems, from what fell from Lord Chief Justice *Willes*, in delivering the judgment of the Court, that if this point had been brought in question, it might have required very good consideration, it being one of great consequence. And

his Lordship there said (a) that "goods taken in execution, or even goods distrained damage feasant, are in the custody and under the protection of the law, and therefore cannot be distrained for rent, is expressly holden in *Coke Littleton* (b), and several other books (c), and we are inclined to be of this opinion; but if it were necessary for us to give any positive resolution on this point, it would be very proper to consider whether the statute 2 *Will. & Mary*, c. 5. and the statute 8 *Anne*, c. 14. have made any alteration in this respect. But we think we have no occasion to enter any further into this matter, because we are clearly of opinion, that if there had been no execution in the present case, yet the corn could not be distrained." The Court therefore thought there, that if they had been required to give a decision on this question, it would have been proper for them to have considered the effect of those statutes. Here, however, it becomes necessary to dispose of it, as the point is expressly raised by the plaintiff's plea in bar. The facts in *Gwilliam v. Barker* were precisely similar to the present, but the question was different, as it turned on whether the sheriff was bound to pay over to the landlord a sum due to him from the defendant for rent. It must be admitted that the *dictum* of the late Chief Baron, which has been mentioned in the course of the argument, is in favour of the landlord's right to distrain, but that was not the point on which the case was decided. It must, therefore, be considered merely as a *dictum* of a moment, and more particularly so, as it seems to be impaired by the sentence which immediately follows it: *viz.* "I do not think that this statute applies to corn in the blade, it would be a monstrous thing to cut it in such a state." That appears to be not only inconsistent with the argument adopted in this case, but with the statute, for it is quite clear that the latter does apply, as growing corn may be taken in execution under it. Having said thus much with respect to those two cases, it is necessary to consider this as a new question to

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(a) Willes, 136. — (b) 47, a. — (c) See Parker's Rep. 120, *et seq.*

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be decided on principle, and with reference to the statutes which may be deemed applicable to it; and in so considering it, it is necessary in the first place to look to the common sense and reason of the thing. With respect to an execution on goods, commonly denominated chattels, the duty of the sheriff is perfectly clear. He is merely to seize, sell, execute a bill of sale, and deliver the goods to the purchaser. His duty is then fulfilled, because he can deliver such goods at the moment of sale, as they may then be removed without trouble or difficulty. This leads me to consider the distinction between goods which may be removed immediately, and crops of growing corn. The latter must be considered in the nature of goods, as they are liable to seizure and sale under a *feri facias*, for the purpose of satisfying the judgment on which such writ issues. It would be quite nugatory to say, that a sale under such a writ would amount to satisfaction, if the right of the purchaser were to cease the moment the bill of sale is executed, and if the corn were not allowed to remain on the land until it was ripe, in order that he might reap the fruits and benefit of his purchase. It is true, that in ordinary cases with respect to goods, the sheriff or person purchasing them of him, is bound to remove them within a reasonable time, as the law looks to the delivery under such removal as a satisfaction of the debt. So, here, the sheriff was bound to deliver within a reasonable time, but it cannot be contended, that he could be so bound until after the corn was ripe, so as to be a satisfaction to the purchaser. When, therefore, I find that the law authorizes the seizure and sale of unripe corn under an execution, I conceive that by reasonable and legal intendment, the purchaser may allow it to remain on the ground until it is ripe, and remove it within a reasonable time afterwards; for it would in strictness, be of little or no value until it had arrived to a state of maturity. This appears to me to be so on the reason of the thing, if not, it may be necessary to have recourse to the statutes authorizing a distress and sale

in cases of this description. By the 11 *Geo. 2. c. 19.* growing corn must be considered as in the nature of goods and chattels, as it may be distrained in the same manner as articles of that nature. I therefore think that the same construction may be put in this case in favour of the purchaser, as would apply to goods in the hands of a judgment creditor. The delivery of the crops, and the satisfaction of the judgment, are the objects of the law, and the former must be considered to remain in the custody of the sheriff until he can deliver them, so as to give effect to the latter. I have before observed, that this case is new, and must be decided on principle. As well, therefore, on principle as reason and common sense, I am of opinion, that the defendant, as landlord, had no right to distrain, and consequently that the plaintiff is entitled to judgment.

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Mr. Justice PARK.—I need only add a few observations, after the clear, elaborate, and satisfactory judgment which has been delivered by my Lord Chief Justice. The question was properly put by my Brother *Hullock*, whether the corn in question, which had been seized under an execution, was liable to be distrained for rent due subsequently to such seizure and sale by the sheriff, and before it was in a fit state to be carried away, so as not to be available to the purchaser under the sale. If the Court were to decide contrary to the opinion we have just heard, the effect of the statutes relative to distresses and sales of this description would be entirely destroyed. Growing corn is, in point of strictness, worth nothing until it is ripe. How, therefore, can any execution be available, unless the sale under the *fieri facias*, which has been issued in this case, can be sustained, and if the purchaser were not allowed to retain what he had bought? It is true, that the Court are now called on for the first time to give a positive decision on this question, but it is not altogether new, as it was commented on by Lord Chief Justice *Willes* in delivering the judgment of the Court in *Eaton v.*

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Southby. That judgment appears to have been given after consideration, and *Coke Littleton* (a) was referred to, to shew that goods taken in execution, were in the custody and under the protection of the law, and therefore could not be distrained for rent, and the Court were inclined to be of that opinion. That is a strong argument in favour of the sale in question. I fully agree with my Brother *D'Oyley*, that if the law authorizes corn of this description to be the subject of seizure under an execution, it must authorize every thing to make it available to the purchaser. It appears, that every thing was done which was required to legalize the seizure and sale. The landlord was paid all the rent due to him at the time, and I am therefore of opinion that the plaintiff, as purchaser, might allow the corn to remain on the land until it was ripe, and could be available to him.

Mr. Justice BURROUGH.—No one can entertain a higher opinion of what fell from the late Lord Chief Baron *Thompson* than myself, but I do not think that the *dictum* which has been ascribed to him in *Gwilliam v. Barker*, can be considered as his deliberate determination, nor as a decision in point. The intimation of the Court in *Eaton v. Southby* appears to me to be a direct authority the other way, and I have no doubt in saying, that I consider the crops in question to have been in the actual custody of the law. What are the facts? The plaintiff claims those crops as a purchaser under an execution duly issued on a judgment of this Court. It is quite clear that he can obtain no satisfaction until the corn is ripe, and in a fit state to be carried away. Till then, he must be considered as being under the protection of the law, for the corn would be of little or no value to him until it was ripe. The cases which have been cited as to executors and assignees are not analogous to the present, as they merely stand in the situation of the parties whom they represent, and the same right of property con-

(a) 47, a.

tinues. That, however, is not the case here, for the defendant became possessed by force of the judgment, and the property was transferred to him by operation of law. If it were otherwise, and the Court were to decide in favour of the landlord, it would merely alter the practice, and the consequence would be, that a writ of *feri facias* might be renewed from Term to Term. If an execution issued after *Trinity* Term, there would be no reason for a renewal, as the purchaser might derive all the benefit from his crop before the *Michaelmas* Term following; besides, it is clear, that the landlord is entitled to no more than one year's rent on the execution of a writ of *feri facias*; and it appears here, that a sum equivalent to it was paid to the defendant at the time of the seizure by the sheriff, and that no more rent was due when the execution was obtained.

Mr. Justice RICHARDSON.—I am of opinion, that growing crops in the hands of the sheriff's vendee, are protected from a distress by the landlord for rent that may become due to him subsequently to the sale by the sheriff. This appears to me to follow as a necessary consequence, as such crops are liable to seizure under a writ of *feri facias*. It must be admitted they may be so, as in point of principle they have always been considered as in the nature of goods and chattels. Where the law authorizes a seizure, it confers on the party not only a protection, but every means to make such seizure available. Now, in this case, the seizure would be wholly unavailable, if the plaintiff as purchaser, could not retain the crops which he had purchased under the execution until they had arrived at maturity, and in a fit state to be cut. The opinion of the Court in *Eaton v. Southby*, seems to approach very nearly to this case, although it was there found unnecessary to decide the point. But the Chief Justice, in delivering the judgment of the Court, after referring to *Coke Littleton* (a) said "that they were inclined to be of

(a) 47, (a).

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opinion that goods taken in execution were in the custody of the law, and therefore could not be distrained for rent. Although perhaps, in this case, the growing corn might not, strictly speaking, be said to be in the custody of the law, still it belonged to the defendant as purchaser, under the sanction of the law. In *Eaton v. Southby* the Court said, that it might be proper to consider, whether the statutes 2 *Will. & Mary*, c. 5. and 8 *Anne*, c. 14. had made any alteration as to the law as laid down in *Coke Littleton*. To these has been since added the 11 *Geo. 2.* c. 19. by which growing corn is made subject to a distress. Although that statute gives to landlords, powers and rights which they did not previously possess, still, it only enables them to distrain growing crop in the same manner as other goods which might be distrainable at their suit. It is quite clear, that goods of the latter description must be taken as subject to the prior rights of other persons. Here, when the distress on which the present action was founded was made, a previous right had attached to the plaintiff by the sale to him under the sheriff, which was incompatible with such distress. Unless it were to be so deemed, the *feri facias* would be wholly unavailable, and I therefore fully concur with the Court, in thinking that there must be

Judgment for the plaintiff.

Wednesday,  
 Nov. 22.

WEBBER, Plaintiff, GREY, Deforciant.

If wood land be converted into arable, the Court will not allow a fine to be amended by increasing the quantity of the latter, as the land would pass under either description.

MR. Serjt. *Lens* moved that this fine might be amended on payment of the additional King's silver, by increasing the arable land from one hundred acres, to an hundred and forty, and adding the word "tithes," which was omitted in the fine,

although it was inserted in the deed to lead the uses. It appeared, that the application to increase the quantity of arable land, was founded on an affidavit, that certain wood land to the amount of forty acres had lately been converted into arable, and that an objection was raised to the title on a late sale of the property, as the arable land was not rightly described in the fine.

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But the Court held, that the amendment in this respect was wholly unnecessary, as the wood land had been converted into arable. That if it were allowed, amendments of this description might be applied for every five or six years, according to the alteration of the lands. That the land would pass whether it was described as wood or arable, and that it was quite time to put a stop to such technical objections. As the word "tithes" was inserted in the deed to lead the uses, the fine was allowed to be amended by its insertion, and the application as to the increase of the arable land was

Refused.

LOMAS v. MELLOR.

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IN this case the plaintiff and defendant stood in the relative situations of landlord and tenant. The latter occupied a farm, at the annual rent of 36*l.* payable at *Midsummer* and *Michaelmas*. At *Michaelmas*, 1817, the defendant paid the plaintiff half a year's rent, except 4*l.* which was due from the latter for goods sold, who then gave the defendant notice to quit on the 25th *March* following, which he did, without paying rent, as none would become judgment by default, and on a writ of inquiry *B.* received 1*l.* more in damages than *A.* had obtained in his action :—Held, that the costs of the one might be set off against the other, although it appeared that *A.* was insolvent, and that his attorney would be thereby deprived of his security for costs.

*A.* brought an action of use and occupation against *B.* and recovered a verdict, and *B.* afterwards commenced an action of trespass against *A.* for seizing his cattle for rent due, and *A.* suffered



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due, according to the terms of the original holding till *Midsummer* then next. In *April*, 1818, the plaintiff followed the defendant's property, and distrained two of his cows, to which distress the latter made no resistance, they being worth little more than the rent due to the plaintiff. In *September*, 1819, the plaintiff brought an action against the defendant for use and occupation, and recovered a verdict, when the latter commenced an action of trespass against the plaintiff for taking his cows, who suffered judgment by default; and on a writ of inquiry, the defendant received 1*l.* more in damages than the plaintiff had obtained in his action for use and occupation.

Mr. Serjt. *Vaughan* on a former day in this Term having obtained a rule *nisi* that the costs of the one action should be set off against the other,

Mr. Serjt. *Cross* now shewed cause on behalf of the plaintiff's attorney, on an affidavit, stating, that the plaintiff was insolvent, and that if the set-off were allowed, the former would lose the only security he had for the payment of his costs. He observed, that although it was a rule in this Court that the attorney's lien for his costs was subject to the equitable claims that existed between the parties in the cause, still, that it was otherwise in the King's Bench, or that at all events, the rule could not apply to this particular case. That the latest decision on this subject was in *Vaughan v. Davies* (a), where this Court allowed the set-off, without paying any regard to the lien of the attorney of the opposite party. He also cited the case of *Thrustout, d. Barnes v. Crafter* (b) as the earliest decision referable to this point; and further contended, that the lien of the attorney must be considered as matter of right, whereas the right to set off costs in one action against another, was merely a recent introduction by

(a) 2 H. Bl. 440. — (b) 2 Sir W. Bl. 826.

statute, and that therefore, the practice of this Court should give way, so as to be made conformable to that of the King's Bench.

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Lord Chief Justice DALLAS.—The rule that the attorney's lien for his costs is subject to the equitable claims existing between the parties in the cause, has been acted on, and most scrupulously adhered to ever since I have been in this Court; and as the practice was settled long previously to that period, I think we cannot now interfere. It has never been doubted, or attempted to be deviated from in the remotest degree, except in the case of *Hall v. Ody* (a).

Mr. Justice PARK.—In *Brown v. Sayce* (b) it was determined, that the rights subsisting between party and party, were paramount to the rights between one of the parties and his attorney.

Mr. Justice BURROUGH.—The general rule in this Court is, that the costs of one action may be set off against another, without regard to the attorney's lien. That has been uniformly adhered to since the case of *Vaughan v. Davies*, which was decided in 1795, from which period the practice appears to have been settled, nor was it ever attempted to be broken in upon but in the case of *Hall v. Ody*. An attorney can have no preferable right; for whether he be entitled to a lien or not, is a mere question of law.

Mr. Justice RICHARDSON concurring,

Rule absolute (c).

(a) 2 Bos. & Pul., 28. — (b) 4 Taunt. 320. — (c) See 1 Tidd, 330, 6th edit. *Lang v. Webber*, 1 Price, 375.

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Wednesday,  
Nov. 22.

PHILLIPS, Demandant, FIELD, Tenant, ROLFE, Vouches.

If marsh land be described as land generally in a recovery, it may be amended by inserting the word "marshy" before "land," on an affidavit, stating how the premises had been occupied since the recovery was suffered.

MR. Serjt. *Onslow* on a former day in this Term, moved that this recovery might be amended, either by inserting "one hundred acres of marshy land," after "one hundred acres of land," or the word "marshy" before land, on an affidavit, which stated, that by indentures of lease and release, dated the 3d April, 1749, certain premises consisting of a farm, lands, marshes, and marsh grounds, called "*Driver's Marshes*," situate at *Brewer's Court*, in the county of *Essex*, containing seventy-five acres, more or less, with all their appurtenances, were conveyed to *Field* in fee. That this recovery, when it was suffered, was intended by the parties, to comprise the seventy-five acres of marshy land, and that either by mistake, or through ignorance, it was described as land generally, and that on a late sale of the premises, the title had been objected to, on the ground that the word "land" was too general, and he therefore prayed to amend, by inserting the word "marshy" before land.

But the Court required an affidavit as to the possession since the recovery was suffered, and on the learned Serjeant's now producing it, they

Allowed the amendment.

Thursday,  
Nov. 23.

ABBOTTS and Another v. BARRY.

A sale of goods effected by fraud does not change the property in them:—Therefore, where the defendant had fraudulently colluded with *I. S.* who was in insolvent circumstances, to obtain wines from the plaintiff, the proceeds of which eventually came to the defendant's hands, in satisfaction of a debt before due to him from *I. S.*:—Held, that the plaintiff was entitled to recover in an action for money had and received.

THIS was an action of *assumpsit*. The first count of the declaration stated, that in consideration that the plaintiffs, at the request of the defendant, would sell to one *Thomas*

*Phillips*, all such goods as he might require in his business as a wine merchant, the defendant undertook to be accountable for the same. It was then averred, that the plaintiffs caused seven pipes of port wine to be delivered to *Phillips*, and assigned for breach, that neither he nor the defendant had paid for the same. There were also counts for goods sold and delivered, money had and received, and the usual money counts. Plea—*non-assumpsit*.

At the trial of the cause before Mr. Justice *Park*, at *Guildhall*, at the Sittings after the last Term, it appeared that *Phillips* was indebted to the defendant in the sum of 500*l.* for goods sold. That an acceptance of *Phillips'* for 300*l.* on account of such goods became due on the 18th *September*, 1818, a few days previous to which, he applied to the defendant, stating his inability to meet it, and requested the defendant either to renew it, or assist him so as to enable him to take it up. This the defendant refused to do, but observed to *Phillips*, that he had better purchase goods than let his acceptance be dishonoured. *Phillips* shortly afterwards, applied to the plaintiffs to purchase seven pipes of port wine, amounting to 340*l.* at four months' credit, and referred to the defendant for a character as to his solvency. He stated, that he had done a great deal of business with him, and that he had been regular in his payments, but he did not mention to them the acceptance of *Phillips*, which was becoming due, or that he had applied to get the bill renewed. The plaintiffs, however, refused to trust *Phillips*, who accordingly again applied to the defendant, and stated, that he thought he could purchase the wines if he could pay half cash, and the defendant told him he could immediately sell them for him. He accordingly purchased the wines for 340*l.*, the half of which he paid in money, and the plaintiffs drew a bill on him at four months date, for the other half, amounting to 170*l.* The defendant, as the broker of *Phillips*, sold the wines to one *Bunyon* at the same price that *Phillips* had given for them, taking *Bunyon's* acceptance at

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four months for the amount, on a bill drawn by *Phillips*, and which he indorsed to the defendant. *Bunyon* lent the 170*l.* to *Phillips* to enable him to pay the half of the value of the wines to the plaintiffs, which the defendant, on receiving *Phillips's* bill on *Bunyon*, repaid him. *Bunyon's* bill was paid when at maturity, and the defendant obtained 170*l.* on account of his debt due from *Phillips*, whose bill for 300*l.* was returned for non-payment. The defendant, subsequently to these transactions, purchased the wines of *Bunyon* at an advance of 1*l.* per pipe, and before *Phillips's* acceptance for 170*l.* became due, he became insolvent, and a commission of bankruptcy was afterwards issued against him.—The first count was abandoned at the trial, there being no evidence to prove the undertaking therein stated. The Jury, however, found a verdict for the plaintiffs, on the ground, that the defendant had been guilty of fraud in obtaining the wines from them. The learned Judge, however, reserved the point as to whether they were legally entitled to recover, for the consideration of the Court.

Mr. Serjt. *Vaughan* on a former day in this Term, had accordingly obtained a rule nisi, that this verdict might be set aside and a nonsuit entered, and submitted, that the action could not be sustained either for goods sold and delivered, or money had and received, as the wines were sold on the credit of *Phillips*, and consequently, that their value could not be recovered as goods sold and delivered to the defendant, as there was no communication or privity between him and the plaintiffs; and as the defendant sold the wines to *Bunyon* on account of, and as the broker of *Phillips*.

Mr. Serjt. *Pell* now shewed cause. The verdict of the Jury was not only perfectly correct, but cannot now be disturbed, as it is manifest that the defendant has been guilty of a most gross and iniquitous fraud. Although, in point of strictness, the action might not be maintainable for goods sold,

still, as the wines had been obtained by fraud, the value of them might be recovered by the plaintiffs on the count for money had and received. The case of *Hill v. Perrott* (a) is not only undistinguishable from, but must govern the present; where it was determined, that *indebitatus assumpsit* was maintainable for goods, which the defendant had by fraud procured the plaintiff to sell to an insolvent, and which the defendant had afterwards obtained the possession of, on the grounds, that he could not set up the sale, because his own fraud had procured it, and that the mere possession, unaccounted for, raised an *assumpsit* to pay. As the defendant afterwards purchased the wines from *Bunyon*, there can be no doubt but that trover would have been maintainable under the circumstances, and as they had been converted into money, it would be most unjust if the plaintiffs should be disabled from recovering the value which they had produced.

Mr. Serjt. *Vaughan*, in support of the rule, observed, that the circumstances as proved at the trial, depended on the testimony of *Phillips*, which must be considered extremely suspicious, as he thereby made himself a party to the fraud; besides, the plaintiffs framed their declaration as on a contract, and the defendant was not charged with fraud, and therefore was not prepared to repudiate it. If the plaintiffs had meant to have so charged him, they should have brought an action against him for giving *Phillips* a false character. This case is distinguishable from that of *Hill v. Perrott*, as there, the contract was made with the defendant himself, and the Court held, that the law would imply a contract to pay for the goods, from the circumstance of their having been the plaintiff's property, and having come to the defendant's possession unaccountably. But here, there was no privity whatever between the plaintiffs and the defendant, and it does not appear, that he was aware of *Phillips's*

(a) 3 Taunt. 274.

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insolvency at the time. Even if the wines had been obtained by fraud, there was no contract whatever between the plaintiffs and defendant, neither does it appear, that he had converted them into money after they had come into his hands.

Lord Chief Justice DALLAS.—It appears to me, that this case is undistinguishable in principle from that of *Hill v. Perrott*. Independently of that, however, I think that this rule ought to be discharged, and upon this plain ground, that the Jury have found as a fact, that a fraud has been committed by the defendant through the medium of *Phillips*; nor can I distinguish between him and the defendant throughout the whole of this transaction, for *Phillips* must be considered to stand in the situation of agent to the defendant, who acted as the principal. Although the fraud might be considered to have been committed by *Phillips*, still, he knew that the benefit resulting from the sale of the wine would eventually be derived by the defendant, as they would ultimately come into his hands. *Phillips* therefore, must be considered as the agent of the defendant for that purpose, but it is not necessary to go that length, and I shall therefore confine myself to this short ground:—It must be admitted, that the sale in question was effected by fraud, and it is equally clear, that a sale of this description works no change of property. The wines must be considered as remaining in the plaintiffs as the original owners, and therefore the produce of such wines obtained by the defendant by the sale of them, must be considered as money had and received by him to the use of the plaintiffs as the original proprietors. On this ground alone, therefore, I am of opinion, that this rule must be discharged.

Mr. Justice PARK.—I am of opinion, that this verdict may stand consistently with the rules of law, without violating or infringing on such rules in the remotest degree.

It is quite clear, that a gross fraud has been practised by the defendant on the plaintiffs, through the instrumentality of *Phillips*. His evidence was not objected to at the trial, and even if he was not a competent witness, the fraud was most fully confirmed by the testimony of *Bunyon*, who proved the facts in a conversation which passed between him and the defendant. The Jury, therefore, were perfectly warranted in finding the transaction to be fraudulent. I concur with my Lord Chief Justice, that this case must stand on that ground, and I also agree with him, that it is not distinguishable from that of *Hill v. Perrott*. That case appears to have been rightly decided, and goes the full length of the present. Whether, therefore, *Phillips* was admissible as a witness or not, appears to me to be beside the present question; although in *Corking v. Jarrard* (a) it was held, that in an action to recover back money which had been entrusted to the plaintiff's servant for a special purpose, and paid by such servant to the defendant for illegal insurances in the lottery, he was incompetent as a witness without a release produced in Court. Another point arose in that case, of which I have a manuscript note, and it appeared that the servant had been furnished with money by her master to pay bills and purchase goods, which she had misapplied by insuring in the lottery; and Lord *Ellenborough* held, that the master might recover back the whole of the money which he had entrusted her with, from the lottery office keeper, as money had and received; and his decision was founded on the authority of *Clarke v. Shee* (b), where it was determined, that money had and received would lie by the true owner of money or notes, against a third person, into whose hands they had come *malâ fide*; provided their identity could be traced and ascertained.

Mr. Justice BURROUGH.—It is quite clear that a gross fraud has been committed on the plaintiffs by *Phillips* and

(a) 1 Camp. 37.—(b) Cowp. 197.

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the defendant, and although the former received half the value of the wines at the time of the sale, still, they were wholly ignorant of the fraud, nor does it appear, that they were aware of any part of the transactions which had passed between *Phillips* and the defendant; at all events, the sum so received by them, would only tend to lessen the amount of the damages. Whether the wines were afterwards converted by the defendant into money or not, I think the plaintiffs are entitled to recover as for money had and received to their use. In *Longchamp v. Kenny*(a) it was decided, that if one person obtains possession of goods entrusted to another to be sold at a fixed price, and, at the time when the goods are to be re-delivered, or the price accounted for, he refuses to do either, and the person to whom they were entrusted, being threatened with an action, pays the fixed price to the owner, such person may recover the sum against him who took possession of them, in an action for money had and received, for the goods shall be presumed to have been sold.

Mr. Justice RICHARDSON was absent.

Rule discharged.

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WHITEHEAD v. HOWARD.

Monday,  
Nov. 25.

THIS was an action of *assumpsit*. The first count of the declaration stated, that on the 19th November, 1808, in consideration that the plaintiff, at the request of the defendant, would retain and employ him to invest and lay out a sum of money in the purchase of an annuity, for and on the behalf of the plaintiff, for certain reasonable reward, to be therefore paid to the defendant, he undertook to invest and lay out the same in the purchase of an annuity for the plaintiff, in good, valid, and sufficient security. The plaintiff then averred, that he retained and employed the defendant for that purpose, and that in pursuance thereof, he delivered to him 770*l.*, which the defendant accepted and received for the purpose aforesaid; and although the defendant did, in part performance of his undertaking, invest and lay out the said sum in the purchase of an annuity, to wit, an annuity of 110*l.* from one *William Alston*, for and on the behalf of the plaintiff, and to be paid by *Alston* to and for the use of the plaintiff, for and during the lives of three persons, yet, that the defendant did not nor would invest or lay out the same in good, valid, or sufficient security, but on the contrary thereof, invested it in very bad, invalid, insufficient, fraudulent, and fictitious security: to wit, a pretended security of certain copyhold premises, holden of the manor of *Purleigh* in *Essex*, whereof *Alston* pretended to be then seised or entitled to, subject to certain mortgages then

Where the plaintiff, in a declaration of *assumpsit* stated, that in consideration that he would employ the defendant (an annuity broker) to invest and lay out the plaintiff's money in the purchase of an annuity, the defendant undertook to invest it on good and valid security; and assigned for breach, that he laid it out on a bad, invalid, and fraudulent security. and the defendant pleaded *non assumpsit infra sex annos*, and *actio non accrevit infra sex annos*, on which issue was joined, and it was proved that the consideration money was paid over to the grantor, and the annui-

ty paid by the hands of the defendant to the plaintiff for six years afterwards, when the grantor became bankrupt and the security failed; subsequently to which, the defendant's managing clerk promised that the plaintiff should be paid, which promise the defendant afterwards recognized:—Held, that the undertaking stated in the declaration being, as to the validity of the security, the subsequent promise could not apply, although it might have given a new right of action on a declaration specially framed for that purpose:—Held also, that the plaintiff could not recover for money had and received, the money having been paid over to the grantor,—nor on an account stated, as there was no existing antecedent debt between him and the defendant.

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charged thereon, whereas, in fact, he was not, at the time of the purchase of the said annuity, and of investing and laying out the said sum, seised of the said copyhold premises, or entitled thereto, of which the defendant had notice. There were other counts, stating that the defendant had not vested the plaintiff's money in any good or responsible security, and that he knew that *Alston* was in insolvent circumstances at the time the annuity was granted. To these were added the common money counts, as well as a count on an account stated. The defendant pleaded first, *non-assumpsit*; secondly, *non-assumpsit infra sex annos*; and lastly, *actio non accrevit infra sex annos*, on all which pleas issue was joined.

At the trial of the cause before Lord Chief Justice *Dallas* at *Westminster*, at the Sittings after the last Term, it appeared in evidence, that the plaintiff, in 1807, had employed the defendant, a certificated conveyancer and annuity broker, to invest money for him by way of annuity, and that he had left 770*l.* with him for that purpose; that part of the security proposed by the defendant, consisted of a copyhold estate, which he stated to belong to *Alston*; that in 1807, *Alston* was possessed of the estate, but that he had surrendered it before *November*, 1808; that the defendant had not inspected the Court Rolls of the manor in which the copyhold was supposed to be situate; that the plaintiff's money was made over to *Alston*, although he had no such estate as was represented, who granted an annuity for it in *November*, 1808, from which time it was regularly paid to the plaintiff by the defendant until *February*, 1814, when *Alston* became a bankrupt; that two sons of the plaintiff were clerks in the defendant's office, and might have inspected the Rolls of the manor, as their father had previously consulted them on the subject of the annuity; that one *Gibbs*, the defendant's managing clerk, after the insolvency of *Alston* had been discovered, promised that the plaintiff should be paid; that there was sufficient property of *Al-*

ston's to pay more than twenty shillings in the pound, and that he would arrange with the defendant, and that the plaintiff had nothing to do with the loss; that the defendant afterwards said, that he would consider of it, and say what he should give to the plaintiff, but that in *December*, 1817, on being asked by the plaintiff's son whether he would make good his promise which he had made through his managing clerk, the defendant said, "although I did promise, I will not do so now, as I have made up my mind not to pay any one, and the plaintiff must abide by the loss."

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His Lordship left it to the Jury to determine, first, whether, from the declaration, as framed, the plaintiff was entitled to recover; and stated, that if there was no direct promise by the defendant to invest the plaintiff's money on good, valid, and sufficient security, the law would not imply any such undertaking upon the facts as proved, because no man, who undertakes for another, unless the action be so framed as to fix him, undertakes to find security which shall be good and valid at all events; secondly, whether the statute of limitations was applicable, or whether the subsequent promise by *Gibbs*, and the defendant's recognizing it, was sufficient to take the case out of it; and, thirdly, whether such promise was absolute or contingent. The Jury found, that the defendant, either through himself or his clerk, had given an express and absolute promise that the money should be invested in good and sufficient security, and accordingly found a verdict for the plaintiff, the amount of which was to be ascertained out of Court; but leave was given the defendant to move to set it aside, in case the Court should be of opinion that the plaintiff was not entitled to recover.

Mr. Serjt. *Vaughan*, on a former day in this Term, accordingly obtained a rule *nisi*, that the verdict might be set aside, and a nonsuit entered; and observed, that this case

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was only distinguishable from that of *Brown v. Howard* (a), on the ground of the subsequent promise made by the defendant's managing clerk, and stated to have been recognized by himself. It is quite clear, that the statute of limitations began to run from the breach of the contract in 1808. It was contended, however, at the trial, that the plaintiff was entitled to recover on the count for money had and received; but even if the promise by the defendant had been fully proved, the plaintiff cannot be so entitled on the record as it now stands. The plaintiff received his annuity from 1808 to 1814, through the hands of the defendant. There was therefore no failure of consideration, neither can this be considered as money had and received as between the grantor and grantee of the annuity, for the defendant paid over the same left with him by the plaintiff to *Alston*, and retained none of it on his own account. The action, therefore, could only be maintainable on the special undertaking of the defendant, and not for money had and received, as there was no failure of consideration, nor can any fraud be imputed to the defendant, although he might have been guilty of negligence in not having examined the Court Rolls of the manor in which *Alston's* estate was said to be situate. Besides, the case of *Short v. McCarthy* (b), is precisely in point, to shew that the plaintiff cannot recover on the declaration as it is now framed, nor can he on the whole of this record consistently with the rules of law, rely on the subsequent promise made by the defendant or his clerk.

Mr. Serjt. *Lens*, and Mr. Serjt. *Pell*, now shewed cause. The Jury have expressly found by their verdict, that the subsequent promise was absolute, and the evidence adduced at the trial most fully justifies the conclusion they have drawn, for the promise appears to be wholly unconnected with any contingency. There can be no question but that the defendant originally undertook to find and provide a suf-

(a) *Ante*, vol. iv. 508. — (b) 3 Barn. & Ald. 626.

ficient security. The only difficulty is, whether the plaintiff can be entitled, on the special counts as framed in the declaration, or on the subsequent promise. After the late decisions in the cases of *Short v. M'Carthy* and *Brown v. Howard*, an original and a subsequent promise must be *ejusdem generis*, and the declaration cannot be framed on the subsequent promise, as being substantial and valid; but at all events, the plaintiff has suffered a most substantial loss, and the money advanced by him may be recovered under the count for money had and received, on the ground, that when a party receives money for one purpose and applies it to another, the party furnishing it may recover it back, in consequence of his instructions not having been duly pursued. It is not necessary that the sum paid by the plaintiff should remain in the hands of the defendant; it is sufficient to shew that it was paid to him in the first instance, and that he received it for the purpose of investing it on a good security. He ought to have fully investigated *Alston's* title to the premises, so as to have prevented even the risk of its being lost to the plaintiff. The defendant should have considered the circumstances under which it was deposited with him; but having invested it on bad security, after having promised the plaintiff to lay it out on a good and sufficient security, it must, on the failure of such security, be considered as money had and received by the defendant to the plaintiff's use. Although the annuity was paid for six years, the plaintiff should not be barred by that, for he had no ground of complaint until default was made. The defendant, in point of fact, has received the money and acted for both parties; for after receiving it from the plaintiff, he paid it over to his nominee, and the annuity was afterwards regularly paid to the plaintiff through the defendant's hands. [Lord Chief Justice *Dallas*.—It appears that the annuity was regularly paid for six years after it was granted. How, therefore, can it be said that the consideration still remains? Besides, it appears that the sum received by the defendant, was transferred to *Alston* before the annuity was

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granted.] It does not appear from the evidence, that *Alston* ever received the consideration money, nor that he paid the annuity to the plaintiff, as it was always received by the latter through the hands of the defendant, or some person authorized by him. The lapse of time gives no new character to the case, and it is quite clear, that if the plaintiff had discovered the insolvency of *Alston* earlier, the defendant would have been liable. Besides, it appears that the defendant and *Alston* had merely accounts between them, and that no money actually passed, but that credit was given by one to the other, according to the accounts kept in the defendant's books. The subsequent promise, therefore, will entitle the plaintiff to recover on an account stated, for the defendant accounted annually to the plaintiff, by payment of the annuity for the sum advanced by him; and on the discovery of the insolvency of *Alston*, the consideration for which it was granted, failed. In *Leaper v. Tatton* (a), it was held, that, in *assumpsit*, against the defendant, as acceptor of a bill of exchange, and upon an account stated, evidence that the defendant acknowledged his acceptance, and that he had been liable, but said, that he was not liable then, because it was out of date, and that he could not pay it, as it was not in his power, was sufficient to take the case out of the statute of limitations, as being good evidence upon the account stated. So, here, there was sufficient evidence to warrant an assumption that the parties had come to an account. Beyond this, there can be no doubt but that there was not only a moral obligation imposed on the defendant, but that in conscience he was bound to repay the money to the plaintiff. Nor does this rest alone upon such obligation, but an express promise to see it properly applied. Is, therefore, the mere circumstance of the defendant's adjusting accounts from time to time between himself and *Alston*, to deprive the plaintiff from recovering the money so advanced to the defendant? The money received by him most clearly belonged to the

(a) 16 East, 420.

plaintiff, and if the security had failed the day after it was granted, there can be no doubt but that an action would have been maintainable against him. According, therefore, to the equitable construction which has always been afforded to an action for money had and received, as well as on the express and subsequent promise of the defendant found by the Jury, the statute of limitations cannot apply, and the plaintiff, therefore, is entitled to retain his verdict.

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Mr. Serjt. *Vaughan*, in support of the rule, was stopped by the Court.

Lord Chief Justice DALLAS.—I am of opinion, that in this case a nonsuit must be entered, and I shall, in the first place, consider how it stands upon the facts, without advert- ing to the manner in which the declaration is framed.—It ap- pears, that *Alston* employed the defendant as his broker, to raise a sum of money for him by way of annuity; that the latter afterwards applied to the plaintiff, who had money to ad- vance, and stated that he had a security, part of which con- sisted of a copyhold estate, in the possession of *Alston*, but which, in point of fact, he did not at that time possess. The defendant did not examine the Court Rolls of the manor in which the estate was said to be, or make any inquiry respect- ing it; but it must be observed, that the plaintiff did not repose his confidence in the defendant alone, for he also con- fided in his two sons, who were clerks in the defendant's office; they might have searched if they had thought proper, and it was a negligence on their parts that they did not do so. It does not appear on the facts, therefore, that there is any thing to warrant us to say, that there was any actual fraud on the part of the defendant, but he was clearly guilty of gross negligence. He undertook to take care that the plain- tiff's money should be invested on good security, and if an action had been brought against him on the ground of ne- gligence in his business, the plaintiff might have recovered,

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provided such action had been properly framed ; but he now seeks to recover on an express undertaking having been given by the defendant for the validity and sufficiency of the security in question. It is quite clear that the defendant's liability on such an undertaking, is barred by the statute of limitations, unless a subsequent promise or acknowledgment can be duly established ; if so, the first question is, whether the defendant's liability can be revived by any subsequent promise to pay a debt with which he was not originally chargeable, and it is manifest that the debt was not originally his own. In order to revive a debt, to take the case out of the statute, there must be a special promise, founded on an antecedent debt, for which a good consideration must be shewn, and if there be such promise where there is no antecedent debt, it is necessary to frame a declaration specially for that purpose. Confining myself at present to the special counts in the declaration, it appears to me, that this case is precisely similar to, and must be decided by that of *Short v. M'Carthy* : there it appears, that in *December*, 1818, the plaintiff having agreed to give 340*l.* for 700*l.* bank annuities, to a Mrs. *Shaun*, for her interest in the stock, applied to the defendant, who was an attorney, for the purpose of having the bargain carried into effect. The instructions stated to have been given were, that the defendant should see that every thing was right ; that the deeds were accordingly prepared and executed at the time, and that the money was then paid by the plaintiff, and that it subsequently turned out that no inquiries had been made at the Bank of *England*, and that there was no such stock standing in the trustees' names, to which Mrs. *Shaun* was entitled, and it appeared that this discovery was not made until *August*, 1818.—Thus far the two cases are exactly similar with respect to the negligence of the parties, for here, the defendant omitted to search the rolls of the manor, and there, he failed to make inquiries at the Bank, and to search the books there, to ascertain whether such stock was standing in the names of true-

tees to which Mrs. *Shaune* was stated to be entitled: there, the action having been commenced against the defendant subsequently to 1818, he pleaded, that the cause of action did not accrue within six years, and it was held, that the plaintiff was not entitled to recover; but the facts in the latter part of that case correspond precisely with the present, for the defendant, on being applied to in *August*, 1818, said, "that it was owing to an omission of his clerk, and that he was responsible;" and the Court held, that there could be no recovery on this subsequent acknowledgment, except under a declaration specially framed for that purpose. Admitting, therefore, that the defendant in this case has been guilty of negligence in not having searched the rolls of the manor, and further, admitting his having made a promise to pay, even assuming it to be an absolute promise, although that appears to me to be rather questionable, but the Jury having found it so, we must now take it to be such, still, the case of *Short v. M'Carthy* is precisely in point, to shew, that on special counts, framed as the present are, the plaintiff is not entitled to recover. This, therefore, leads me to the consideration of the common counts, and it has been stated, that the plaintiff is entitled to recover on that for money had and received, on the ground, that the consideration having failed, either totally or partially, by the discovery that the security was of no value, and the annuity's ceasing to be paid, the sum the plaintiff advanced as the consideration for it, must be deemed to have been money had and received by the defendant to the plaintiff's use; but I think there is no foundation whatever for the plaintiff's recovering on that count: if there were, the like argument would have been adopted in *Short v. M'Carthy*, but there no such attempt was made. Is it then to be considered as money had and received by the defendant to the use of the plaintiff? It does not appear to me, that this case falls within those where it has been decided, that if the consideration fails, the person who receives the money is bound to repay it:—Here, if an action had

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been commenced against *Alston* on the ground of failure of the consideration, he would have been liable to pay. That alone, therefore, is an answer to the question as to whether the defendant received the money to the plaintiff's use. If it were so construed, it would greatly extend the doctrine which has hitherto been applied to cases of money had and received. It appears, that the money was paid over to *Alston*, and that he continued to pay the annuity until he became insolvent. It would be altogether a different question if he had never received it, and it cannot be said, that the defendant, merely because he was guilty of negligence in looking after the security, is to be liable to an action for money had and received, and that he must therefore be considered as the party who granted, received the consideration for, and paid the annuity. If, therefore, he received the money for the annuity at all, he received it to the use of *Alston*, and the plaintiff has not only been paid on account of the latter, but consented that the debt might be proved under a commission of bankruptcy which afterwards issued against him. The plaintiff therefore, cannot be entitled to recover under the count for money had and received, and there is as little ground for saying that he can do so under that on an account stated; for a party can only recover on such a count where a debt is actually in existence, and here there was no existing debt due from the defendant, who merely negotiated between *Alston* and the plaintiff, and I am therefore of opinion that the latter is not entitled to recover.

Mr. Justice PARK.—It may be unnecessary for me to say more, than that I perfectly agree with my Lord Chief Justice, although at first view, I felt some difficulty at the apparent hardship of the case. We must not, however, be led by that, to decide contrary to law. There being no special count as to the revival of an old debt, it must be assumed that the promise was absolute, and if so, I cannot distinguish this case from that of *Short v. McCarthy*. I am not

aware of any decision where a new and subsequent promise after the operation of the statute of limitations, has been ever applied to any thing but an actually existing debt. Here, it is quite clear that no debt was contracted by the defendant; still, however, he was guilty of extreme negligence. The main point which was relied on in the course of the argument for the plaintiff was, that the consideration for the annuity must be considered as money had and received by the defendant to the use of the plaintiff, and that it was doubtful from the evidence, whether that sum had ever been paid over to *Alston*, but as the Jury by their verdict negatived the presumption of fraud, it would be too much to assume, that *Alston* did not receive it, after the lapse of such a length of time. So, as to whether the plaintiff can be entitled to recover on the count for an account stated, an antecedent and legal debt must have existed between him and the defendant, in order to render that count available. I am therefore of opinion, that a nonsuit must be entered.

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Mr. Justice BURROUGH.—The plaintiff's only remedy in this case, would have been, by an action for negligence, but the time for bringing it has long since gone by, and contracts of this description cannot be revived by any subsequent promise. It is quite clear that an action for money had and received is not maintainable against a person who has paid over the money to another, according to the directions of the person who deposited it with him. In *Sadler v. Evans* (a), it was held, that an action for money had and received to the plaintiff's use, must be brought against the principal, and not against the receiver or collector. Here, I think there can be no doubt, but that the money was paid by the plaintiff to the defendant in order that it might be immediately paid over by him to *Alston*, the grantor of the annuity, and this seems to me to be apparent, as the annuity

(a) 4 Burr. 1285.

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was regularly paid for six years after it was granted. If the defendant had admitted a certain sum to be due, the plaintiff might perhaps have been entitled to recover on the count for an account stated; still, however, there must have been an existing debt between the parties to render that account available. But further, it does not appear that there was any absolute promise to pay on the part of the defendant, for the evidence turned on the testimony of his managing clerk, and the promise made by him rested on a contingency, viz. on the event of *Alston's* effects turning out to be insufficient. He therefore, alluded to *Alston's* property only, and not to the defendant's, and the subsequent expression used by the defendant himself, must have had reference to this former promise of his clerk, which was altogether founded on contingency.

Mr. Justice RICHARDSON was absent.

Rule absolute for a nonsuit.

(IN THE EXCHEQUER CHAMBER.)

Monday,  
 Nov. 27.

DAVIDSON and Others v. CASE. [In Error.] (a).

An abandonment to the underwriters on ship, transfers freight earned subsequently to such abandonment, as incident to the ship. Therefore, where there had been two separate in-

THIS was an action of *assumpsit* brought by the defendant in error, for money had and received. The declaration contained the common money counts, to which the plaintiffs in error pleaded the general issue.

At the trial of the cause before Lord Chief Justice *Ellenborough*, at *Guildhall*, at the Sittings in *Trinity Term*,

(a) See 5 Maule & Selw. 79.

surances on a general seeking ship, the one on ship and the other on freight, and the ship and freight were abandoned to the respective underwriters, who each paid a total loss; and the vessel was captured and recaptured, and ultimately performed her voyage, and earned freight:—Held, that the underwriters on ship, under the abandonment of ship to them, were entitled to such freight.

1815, the Jury found a verdict for the defendant in error for 71*l.* 12*s.* 10*d.* damages, subject to the opinion of the Court of King's Bench, upon the following case :

Messrs. *Brotherston & Begg* were owners of a vessel called the *Fanny*, which was a general seeking ship, and sailed on a voyage from *Rio de Janeiro* to *Liverpool*, with a cargo of goods on freight, the property of different persons. On the 27th *January*, 1814, Messrs. *Brotherston & Begg* insured the vessel on the said voyage, valued at 7000*l.* and on the 22d of *April* following, they insured the freight of the said voyage by other policies, and with other underwriters, and valued the same at 4000*l.* The vessel, with the cargo on board, was captured in the course of the voyage by an *American* privateer, and thereupon Messrs. *Brotherston & Begg* gave notice of abandonment at the same time to the respective underwriters on ship and freight, who severally accepted the same. Afterwards, the vessel was recaptured by one of his Majesty's ships of war, was brought to *London*, and by decree of the High Court of Admiralty, restored to the owners, with the cargo, on payment of salvage and expences. The vessel arrived at *Liverpool*, delivered her cargo there, and earned her freight. It was agreed between the ship owners and underwriters on ship, but not by the underwriters on freight, that the defendants (plaintiffs in error) should sell the vessel and receive the produce thereof, and should also receive the freight of the cargo for the use and benefit of all persons respectively, who should be found to be entitled thereto. The underwriters on ship and freight severally paid and satisfied the ship-owners for a total loss. The underwriters on ship paid the loss on ship before the underwriters on freight paid the loss on freight. The defendants (plaintiffs in error) received and paid to the underwriters on ship, the amount produced by the sale of the ship, which was about 33 *per cent.* upon their respective subscriptions to the policy on ship. The defendants (plaintiffs in error) also received the freight of the cargo

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which they held under the terms of the agreement, and which was 35*l.* 16*s.* 5*d.* *per cent.* clear, on the sum insured on ship. The underwriters on ship, and also the underwriters of freight, severally claimed from the defendants (plaintiffs in error) the freight thus received. The plaintiff (defendant in error) was an underwriter on ship, to the amount of 200*l.* and, as such, claimed to recover a proportion of the money received by the defendants (plaintiffs in error) for freight. The question for the opinion of the Court of King's Bench was, whether the plaintiff (defendant in error) was entitled to recover. If he was, the verdict was to stand, otherwise a nonsuit was to be entered.

The case was argued in that Court, partly in *Hilary* and partly in *Easter* Terms, 1816, when three of the Judges of that Court (a) were of opinion, that the plaintiff (defendant in error) was entitled to recover, and he obtained judgment accordingly. But on the last day of the latter Term, the Court gave leave that that case might be turned into a special verdict, for the purpose of obtaining the opinion of this Court, on a writ of error. The special verdict was in substance the same as the special case, and came on for argument in the course of the last Term (b), when,

Mr. *Littledale*, for the plaintiffs in error, submitted, that as freight forms a distinct subject of insurance by our law, it follows that it may be abandoned to the underwriter on freight, and does not follow the abandonment of ship to the underwriter on ship. There is no decision precisely in point, this question therefore must be determined on general principles, as the case of *Thompson v. Rowcroft* (c), and those which followed it, were each decided on its own peculiar circumstances. It may be laid down as a clear proposition, that a contract by the assured with the underwriter on ship, and that with the underwriter on freight, are of a wholly dif-

(a) *Dissentiente* Mr. Justice Bayley.

(b) Mr. Justice Richardson and Mr. Baron Graham were absent.

(c) 4 East, 34.

ferent description. If therefore, there be two distinct insurances on ship and freight, and by abandonment, the insurer of the one becomes entitled to the ship, so, equally, the insurer of the other, will, by abandonment, become entitled to the freight. The underwriter on ship only engages to be responsible in value, as far as the body, apparel, and tackle of the ship may suffer from the perils insured against. If, therefore, the ship be lost, he ought not by an abandonment to gain more than the subject of his insurance:—On the other hand, the underwriter on freight does not engage for any damage to the ship, nor for the solvency of the owner of the goods, nor of the party who hires the vessel on freight. If it were otherwise, it would be most unjust, as the insurer on ship by the abandonment to him, would be entitled to acquire freight, although he had paid no consideration for it. Freight may be recovered on the original title under a bill of lading or charter-party; it is therefore a subject of distinct insurance, and applies only to the cargo which may be on board. It has been contended, however, that under an abandonment, a ship passes in the same way as by a transfer or conveyance by sale. It is true, that a beneficial interest in freight passes by an assignment of ship, because, on the purchase and sale of the latter, it is the intention of the parties that not only the body of the ship, but all its incidents should pass, and they agree upon a price accordingly, and it is conveyed by operation of law; but there must necessarily be a contrary intention where there is a separate and distinct abandonment of ship and freight, for at the time of the abandonment of the former, the underwriters on ship had no contract or stipulation with respect to the freight. In *Splidt v. Bowles* (a) it was determined, that a covenant in a charter-party to pay freight to the owner for the hire of the vessel, was not transferred to the vendee by a bill of sale of the ship, made

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(a) 10 East, 279. See also *Chimney v. Blackburne*, 1 Hen. Bl. 117 (a).



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during the voyage; on the ground, that at law the covenant was not transferred to the assignees of the ship by the assignment of the property in her, in the same manner as certain covenants run with land, for that the charter-party was a mere personal contract for the payment of the freight, and could not be assigned to the vendees by the transfer of the property in the ship; but an underwriter on ship has no contract but on the vessel itself, which is his only subject of insurance, whereas a right to freight depends on any agreement that may be entered into between the parties. If an underwriter on ship were to be deemed liable to a loss on freight, he would require a larger premium, but all he undertakes to insure against is the loss of the vessel. If the freight earned subsequently to the abandonment, be transferred to the underwriter on ship, it would amount to a fraud on the underwriter on freight; and there can be no difficulty in apportioning to each set of underwriters the respective sums to which they may respectively be entitled on ship and freight. It is immaterial to an underwriter on freight, whether the owner of the ship had insured her or not, but if he had insured both ship and freight, and abandoned the former only, it would not prevent the underwriter on freight from recovering. The respective rights of the parties are fixed when the insurance is entered into, and there is neither hardship nor illegality in there being different insurances on ship and freight, and there is no legal principle to shew, that the owner could be entitled to the latter, unless he had entered into a distinct contract for it. The claims of the underwriters, as well as the subject-matter of the insurance on ship and freight, are separate and distinct, for if a person purchase a ship under a contract, he can only be entitled to her body and tackle, but if a ship and cargo be assigned to him at sea, the freight might be considered as incident to it. As, therefore, the underwriters on freight had in this case a separate claim, the owners could not, by abandonment, transfer to the underwriters on ship any thing more than the ship itself,

In *Mestaer v. Gillespie* (a) the Lord Chancellor said "that actions have been frequently brought upon insurances on the freight and on the ship, in which the owners were distinct persons, and that in *Camden v. Anderson* (b) it was never doubted that the property in the freight and in the ship might be in different persons." It appears, therefore, that if the owner of a ship has not insured freight, he may be entitled to it after he has abandoned her to the underwriter on ship, as well as the underwriter on freight, in case he had insured such freight; for underwriters on ship have nothing at all to do with the freight, and if a vessel be abandoned to them, the freight subsequently earned belongs to the owner, and he may do with it whatever he pleases.

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Mr. *Scarlett*, *contrd.*—It has been contended for the plaintiffs in error, that this case must be decided on principle only, but all the previous authorities are precisely against the doctrine contended for. It must be admitted, that if a ship-owner parts with his interest in her, the party who purchases is entitled to the freight, although there be no specific contract or reservation respecting it. Freight being the earnings of a ship, it must follow the property in her. Under the assignment of a vessel, freight has always of necessity been deemed to pass to the assignee. That principle, therefore, is illustrative of the present case. There is no distinction to be drawn between an abandonment and an assignment of a ship, they only differ as to the mode of transferring the property in her. A conveyance may be made under the register acts, but there is no ground of distinction to be drawn between that and an ordinary conveyance—they are both voluntary. By an abandonment to an underwriter on ship, all the interest of the owner becomes vested in him. If the voyage be prosecuted further, it is at his expence. So, if she be lost, he is subject to such loss. It must therefore follow as a matter

(a) 11 Ves. 629.——(b) 5 Term Rep. 709.

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of necessity, that if he be liable on the one hand, so, as the ship must be considered as his property, he must be entitled to the freight subsequently earned by her as against the owner, as though he were in fact the owner of the ship himself. It must be inferred, that when parties enter into a contract, they must be aware of all the legal consequences attached to it; for instance, if a vessel be captured and restored to its former owner, he must be aware that he is liable to the expences of salvage. It is peculiar to this country, that insurances on ship and freight form distinct subjects of insurance. In *Camden v. Anderson* (a) it was held, that the right of freight results from the right of ownership, and that it was not only incident to a ship, but inseparable from her, as rent is to that of land; and the principle there laid down was carried to its most rigorous extent. So, in *Morrison v. Parsons* (b) it was determined, that if the owner of a ship, having chartered her for a voyage, assigns her before the voyage, though he afterwards assigns the charter-party to another, if she earns freight, the assignee of the ship is entitled to the freight, as incident to the ship, although he could not sue on the charter-party otherwise than in the name of the assignor. But it was expressly decided in that case, that payment of freight to the assignee of a chartered ship must be considered as payment to the original owner. If this doctrine be applied to the case of an abandonment, the case of *Morrison v. Parsons* is decisive of the present. This question will not affect any rights of the underwriters on freight and the assured, and the cases of *Thompson v. Rowcroft* (c), *Leatham v. Terry* (d), *McCarthy v. Abel* (e), *Sharp v. Gladstone* (f), as well as *Splidt v. Bowles* (g), are not only applicable to the present, but are decisive to shew, that the defendant in error is entitled to recover. Although in *Green v. The*

(a) 5 Term Rep. 709.——(b) 2 Taunt. 467.——(c) 4 East, 34.
 (d) 3 Bos. & Pul. 479.——(e) 5 East, 388.——(f) 7 East, 24.——
 (g) 10 East, 279.

Royal Exchange Assurance Company (a), and *Idle v. the Same* (b), it was held, that under the circumstances, there was no necessity for an abandonment of the freight;—still, a ship and cargo may be abandoned because they are both *in esse* at the time of the abandonment. It therefore follows, that abandonment can only be made of that which is capable of being taken possession of by the person to whom it is abandoned. Freight may or may not be earned, and the right to it stands in the same situation as the right to the performance of a personal contract, which, as it is not reduced into possession, must be considered as a *chose in action*, and not capable of assignment. If, therefore, freight be not assignable, it follows of necessity, that an abandonment of it to an insurer on freight, will not affect the rights of an insurer on ship, to whom an abandonment has also been made of ship, for abandonment is merely a species of assignment between the assured and the underwriters. Here, the owners having abandoned to the underwriters on ship, conveyed to them not only their interest in the ship itself, but her future earnings, which were not effected by the abandonment to the underwriters on freight, for the latter could not be assignable without a special contract or an actual agreement. The underwriters on ship, may, immediately after the abandonment, turn her to any advantage they may think proper, but how can freight be earned subsequently to such abandonment, if the abandonee be not entitled to take possession of the ship, so as to be enabled to endeavour to obtain it. As, therefore, the possession of the ship, is on the abandonment of the owners, vested immediately in the underwriters on ship, the rights of the underwriters on freight cannot alter their property. If there be an insurance on ship by one set of underwriters, and on freight by another, and the owner assign her during her voyage to others, who change her destination, the policy on freight is discharged; and the same rule applies if the underwriters on

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• (a) 1 Marsh. 447. — (b) Ante, vol. iii. p. 115.

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ship were to alter the course of the voyage after an abandonment to them. They must be considered so far in possession of her that they may be empowered either to alter the destination of the voyage, or break her up, or if she pursues the same voyage, still, the property in her is vested in them. Neither, therefore, on principle, nor by previous decisions, can the plaintiffs in error as underwriters on freight, have any claim to such freight against the defendant in error as an underwriter on ship, and more especially so, as he has paid a total loss.

Mr. *Littledale*, in reply.—It has been said, that freight is as incident to a vessel as rent is to land, but it bears no analogy whatever to rent issuing out of land, which is incident to the reversion and never assigned. Where there are separate insurances on ship and freight, the rights of the parties are wholly distinct. The case of *Spldit v. Bowla* was determined under particular circumstances, and the rights of the parties to receive the freight depended on the covenant contained in the charter-party of affreightment. The case of *Thompson v. Rowcroft*, and those which followed it, are also distinguishable from the present, as the freight was there considered as arising from, and incident to the ship. Here, the owners gave notice of abandonment at the same time to the respective underwriters on ship and freight. They, therefore, contemplated that she was wholly lost. Whether she were re-captured or not was wholly fortuitous. It has also been contended, that if an underwriter on ship obtains her by re-capture, he may fit her out and send her on what voyage he pleases, but in that case the freight subsequently derived would not be earned according to the original contract, for the voyage would be completely altered. The true line of distinction turns on the ground, that in this country, ship and freight may be distinct subjects of insurance, and consequently the underwriters on the latter are entitled to all the rights and privileges which may accrue to

them from an insurance on freight, notwithstanding technical rules, on which the whole law of insurance is founded. Where, therefore, there is a separate abandonment of ship and freight, it does not operate as the transfer of a ship by sale. The underwriter on the one, merely insures the materials of which the vessel is composed, and on the other hand, the underwriters on freight must be deemed to be entitled to all the advantages that may accrue therefrom, as the underwriters on ship, may, after abandonment, be entitled to the body of the ship itself. Although it may be contended, that freight is not the subject of abandonment, still, in cases of a total loss, the underwriters thereon are entitled to the same privileges and advantages, as if it were a tangible material, although the party with whom the contract for the affreightment of a vessel was made, is the proper person to sue upon that contract for the non-payment of freight, notwithstanding he may have assigned his interest in the vessel to another since the making of the contract, and before the commencement of the action.

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Cur. adr. vult.

Lord Chief Justice DALLAS on this day delivered the following judgment:—

This case comes before the Court on error from the King's Bench, and it will not be necessary to state the facts in detail, as they will be found fully and accurately set forth in the printed report of what passed on the original hearing. It will be sufficient to observe, that there having been two separate insurances, the one on ship, and the other on freight, and the ship having been captured in the course of the voyage, and re-captured, and having ultimately earned freight, and there having been an abandonment of ship to the underwriters on ship, and of freight to the underwriters on freight, the question arises, whether upon such abandonments, the abandonment of ship includes freight, or whether the underwriters on freight are entitled thereto, as having

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stress upon the fact, that freight passes under a general assignment of ship, because it appears to me that this is begging the question, which arises on a supposed distinction resting upon abandonment as different from common transfer. The effect of it, correctly considered, is only to remit the question to the general operation of law, supposing the distinction contended for to fail. Nor do I place reliance on the assignee of the ship becoming the owner of her, in a common case, for here again, the question turns upon the asserted distinction. Neither do I give weight to the mere fact of separate insurances, for this also, would be to take the point for granted, and they are not separate but connected, if made under a general understanding that each shall refer to, and be regulated by the other.

But the case seems to me, to result to this; if, in every other case of transfer, the freight follows the assignment of the ship, and if abandonment be but a different term for assignment, and the same in effect, unless modified to a different purpose by the agreement of parties; and if in this case, so far from there being any such agreement, either actual or in fact, or in law to be implied, the contrary is to be presumed, (the case only amounting to claim on one side, and resistance to such claim on the other,) the reason fails for taking this case out of the general law, and consequently the underwriters on ship, under the abandonment to them of ship, are entitled to freight:—And in so deciding, we shall not break in upon the general legal principle, by engrafting upon it an anomaly of doubtful convenience, nor will the decision lead to any difficulty in future, as ship and freight may be made the subject of one and the same insurance; or if there be any practical objection to this, of which I am not aware, the parties may contract with reference to the law as finally now settled, supposing the case to end here.

I will merely further state, that I have avoided going into much that has on former occasions been closely, or loosely applied to the subject, having confined myself for the reasons

given, and which I will not repeat, to a single and general view of it.

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In conclusion, I have only to add, that the judgment of the Court of King's Bench must be

Affirmed.

LLOYD, Assignee of WARWICK, a Bankrupt, v. HBATH-  
COTE, Esq.

Monday,  
Nov. 27.

THIS was an action for money had and received, and brought by the plaintiff as assignee of *Warwick*, a bankrupt, against the defendant, as Sheriff of *Hertfordshire*, to recover from the latter, the fruits of an execution which had been levied against the goods of the bankrupt, the produce of which remained in the hands of the defendant.

At the trial of the cause before Mr. Baron *Wood*, at the last Assizes at *Hertford*, the trading was admitted, and a notice given to dispute the commission and act of bankruptcy. With respect to the latter, it was proved by the bankrupt's servant, that on the 9th of *February*, he told his wife that he had a bill to make up to send to *London*, and desired her to say that he was not at home, if any person called. That shortly afterwards, the collector of the highway and church rates called, and asked the bankrupt's wife if he was at home, and told her, that he came for a church rate, amounting to 8s. 9d. and the highway duty to a like amount; to which the wife answered, that he must call again, as the bankrupt was not at home. Evidence, however, was adduced to shew that he was at home at this time, and employed in his yard sawing wood; it was also proved that the rates were due, and that they had regularly been paid before, when it

A denial by a trader, to the collector of church and highway rates, who called for assessments due from him, after he had given a general order to be denied to all comers, is an act of bankruptcy; and such order is sufficient evidence of a beginning to keep house, with an intent to delay creditors;—and a beginning to keep house with such intent, constitutes an act of bankruptcy, although no creditor is actually delayed thereby.

Declarations made by a bankrupt before and after the issuing of a commission

against him, are inadmissible to shew that it was founded in fraud.



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was objected for the defendant, that the collector of these rates, could not be considered as a creditor within the bankrupt laws, as there was no debt due to him, in respect of which he might sue out a commission, or arrest the party, and consequently, that a denial to him did not constitute an act of bankruptcy, by beginning to keep house with intent to delay creditors. The learned Baron, however, over-ruled the objection. In order to establish the petitioning creditor's debt, it was proved that the bankrupt was indebted to Messrs. *Lloyd* in the sum of 91*l.* 11*s.* 3*d.* before the act of bankruptcy was committed, and in the further sum of 80*l.* to one *Cooper*, for linen goods furnished by him; and a question arose, as to whether the credit on which these goods had been sent, had expired or not; and the learned Judge was inclined to think, that there was not sufficient evidence to shew that the credit was at an end, and observed to the Jury, that unless it was clear that the credit had expired, the defendant would be entitled to a verdict<sup>(a)</sup>. It was further proposed to prove that the commission was fraudulent, as it was issued at the instigation of the bankrupt himself; and it was contended, that he was a competent witness as the object of his testimony would be to defeat, and not to uphold the commission, and that declarations made by him before and after the issuing thereof, were admissible for this purpose. But the learned Judge held, that such evidence was not receivable, and that the bankrupt could not be examined as to this fact, and he left it to the Jury to determine, first, whether there was a denial by the bankrupt's wife to the collector of the rates in question, and whether the sums he applied for, were due from the bankrupt at the time, so as to constitute a beginning to keep house with intent to delay a creditor; and secondly, whether there was a debt due from the bankrupt to *Cooper* before the act of bankruptcy. They found in the affirmative, and accordingly gave a verdict for the plaintiff.

(a) This point was abandoned in the argument for the new trial.

Mr. Serjt. *Lens*, on a former day in this Term, applied for a rule *nisi* that this verdict might be set aside, and a new trial granted, on the grounds, first, that the act of bankruptcy was not established; secondly, that the verdict as to the petitioning creditor's debt, was contrary to evidence, and the opinion of the learned Judge; and thirdly, that evidence to defeat the commission had been improperly rejected. But the Court observed, that declarations of the bankrupt after the issuing of the commission, could not be received, and that he was therefore an incompetent witness for the purpose proposed; and the rule was accordingly granted on the two first points only. As to the act of bankruptcy, the learned Serjeant admitted, that on the authority of *Jeffs v. Smith* (a), a denial by a trader to a tax-gatherer calling for the assessed taxes, and property tax, was sufficient to constitute an act of bankruptcy, but the principle of that decision clearly appeared to be, that the Crown might proceed immediately against the person of the debtor, as well as against his estate, whereas, the only remedy for the non-payment of the highway assessment in this case, was given by the 13 Geo. 3. c. 78. s. 68. (b), from which it is manifest, that no demand could be immediately enforced, and consequently, it was not such a debt as would support a commission, or for which the debtor could be arrested. The same principle applies to the church rate, which in this case was only recoverable by the mode pointed out by the statute 53 Geo. 3. c. 127. s. 7. (c), and where that statute does not apply, the only remedy is in the Ecclesiastical Court.

(a) 2 Taunt. 401.

(b) By which it is enacted, that if any person should refuse or neglect to pay the sum assessed upon him, by any assessment to be made in pursuance of that act, within ten days after demand thereof made, the same should be levied by the surveyor, or any other person authorised, by warrant of one Justice of the Peace, by distress; and in default of distress, it should be lawful for such Justice to commit the person so refusing to the common gaol, there to remain until he should have paid the sum so assessed, and the costs and charges occasioned by such neglect or refusal.

(c) Which, after reciting that it was expedient that church rates of

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Mr. Serjt. *Taddy* now shewed cause. The main question is, whether the bankrupt began to keep house, with an intent to defraud or delay his creditors. It is quite clear that he caused himself to be denied to the collector, who must be considered as a creditor, as the assessments demanded by him constituted a debt due from the bankrupt at the time. As to whether it amounted to an absenting himself was not raised at the trial. It is not necessary that there should be a denial to a creditor;—if there be a beginning to keep house it is sufficient. In *Bayly v. Schofield* (a), it was held, that if a trader under an arrest for debt, escape from the officer, and remain in another person's house until dark, and then return home, and give directions to be denied to any one that called, it constituted one or more act or acts of bankruptcy, under the meaning of the words of the statute, “beginning to keep house,” or “otherwise absenting himself.” And Mr. Justice *Le Blanc* there said (b), “a denial is not one of the acts of bankruptcy enumerated in the statute. It has indeed been received as conclusive evidence, if unexplained, of an limited amount unduly refused or withheld, should in certain cases, be more easily and speedily recovered, it was enacted, that after the passing of that act, if any one duly rated to a church rate, the validity whereof has not been questioned in any Ecclesiastical Court, should refuse or neglect to pay the same sum at which he was so rated, it should be lawful for any one Justice of the Peace of the same county, &c. where the church was situated, in respect whereof such rate should have been made, upon the complaint of any churchwarden or churchwardens, who ought to receive and collect the same, by warrant under the hand and seal of such Justice, to convene before any two or more of such Justices, any person so refusing or neglecting to pay such rate, and to examine upon oath into the merits of the said complaint, and by order under their hands and seals, to direct the payment of what was due and payable in respect of such rate, so as the sum ordered and directed to be paid as aforesaid, do not exceed 10*l.* over and above the reasonable costs and charges, to be ascertained by such Justices; and upon refusal or neglect of such party to pay according to such order, it should be lawful for any one of such Justices, by warrant under his hand and seal, to levy the money thereby ordered to be paid, together with the amount of such costs and charges, by distress and sale of the goods of such offender, rendering only the overplus to him, the necessary charges of distraining being thereout first deducted and allowed by the said Justices.

(a) 1 Maul. & Selw. 338.—(b) Id. 352.

act of bankruptcy, by beginning to keep house; but it is not the only evidence by which an act of bankruptcy may be established. It may be proved also, by evidence of his absenting himself, or of his keeping his house with intent to delay his creditors;" and Mr. Justice *Bayley* observed, (a) that "an actual denial to a creditor is not essential to constitute an act of bankruptcy by beginning to keep house." Here, there can be no doubt as to the intent; and in *Dudley v. Vaughan* (b) it was determined, that if a trader withdraws from one part of his house where he had before usually sat, and where there was free access to him, to a more retired part of it, to avoid personal applications for money, by means whereof his creditors were prevented from importuning him, it is a beginning to keep house, within the meaning of the statute. So, here, it appeared that the bankrupt went from his house to the yard. The intent to delay creditors is strengthened by an act of denial, although such denial does not of itself constitute an act of bankruptcy. So, in *Robertson v. Liddell* (c) it was held, that an intention to delay creditors, although no delay takes place, is an act of bankruptcy, and a denial is usually given in evidence, not to shew the fact of the creditors being delayed, but as evidence to explain the equivocal act of the trader's keeping in his house, and to shew that he began to keep house with intent to delay his creditors. But this case is undistinguishable in principle from that of *Jeffs v. Smith*; and whether process could be immediately sued out or not, to recover the arrears of the church and highway rates, the collector was equally a creditor, whatever the nature of his remedy might be, provided the rates were due at the time they were demanded, and they constituted a debt from the moment of the assessment. The bankrupt caused himself to be denied to a person who had a legal demand, and who was no less a creditor than another, because he had no immediate remedy or mode of enforcing it, and whether he

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(a) 1 Maul. & Selw. 354.—(b) 1 Campb. 371.—(c) 9 East, 487.

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called to collect taxes due to the crown, or rates for the benefit of the public, it makes no difference whatever. The statutes relative to bankrupts make no distinction between debts recoverable immediately at law, and those which may become payable in future, for by the 7 *Geo.* 1. c. 31. s. 1. bills and notes, although not due at the time of issuing a commission, are proveable under it, on deducting a rebate of interest; and by the 49 *Geo.* 3. c. 121. s. 9. all *bonâ fide* debts not payable at the time of the bankruptcy, may be proved on those terms. So, by the 5 *Geo.* 2. c. 30. s. 22. persons having such securities may become petitioning creditors, though they may not have the immediate means of suing out execution. Here, there was not only a manifest intent by the bankrupt to delay his creditors, and of his beginning to keep house for that purpose, but a sufficient absenting himself to constitute an act of bankruptcy within the meaning of the statute.

Mr. Serjt. *Lens*, in support of the rule.—As to whether there was a sufficient absenting himself by the bankrupt, to constitute an act of bankruptcy, requires further evidence, and that point was not raised at the trial. It has never been decided, that a person can be deemed to have absented himself, by merely going from one part of his premises to another. The cases cited as to this point, do not prove the position contended for; and in *Bayly v. Schofield* the trader had escaped into another person's house, and the judgment of the Court was founded expressly on that circumstance. But here, his merely going from his house to his yard was not an absenting himself to delay his creditors. The only point in question therefore, is, whether the collector of the rates, who stands in the situation of an officer having a particular remedy afforded him by the statutes, in case of default of payment of such rates, can be considered as a creditor in the present instance. He had at first only a power to demand payment, and in case of refusal to pay the sums assessed within ten days from the time of

such demand, to levy the same by distress, under the 13 Geo. 3. c. 78. in default of which, the party refusing might be committed to prison until the sums so assessed were paid; and the 53 Geo. 3. c. 127. contains a similar provision, as on complaint of the churchwarden to a Magistrate of a person neglecting to pay, such Magistrate may after order, issue his warrant to levy the sum due by distress and sale. The payment of these sums therefore, could not be enforced either by distress or otherwise, until the expiration of ten days from the time the demand was made, or after the order was issued, and they cannot be said to be due, or constitute a debt, until the provisions of those statutes had been complied with in this respect. It is therefore, in the nature of an inchoate debt, creating a mere liability to pay in the first instance; and if the person on whom the demand is made happens to be from home, no proceedings can be taken against his goods or person, either by distress or otherwise, until the expiration of the time limited by those statutes. In *Jeffs v. Smith*, it was a debt due to the King, and the Crown might have sued immediately, without the interval of ten days, or waiting for the order of a Magistrate. The statutes which have been referred to as applicable to cases of bankruptcy, are inapplicable to the present question, for in *Ex parte Levi* (a) it is stated, that the denial must be to a creditor who has a debt at that time due, and that a denial to the holder of a security payable at a future day, will not be sufficient to constitute an act of bankruptcy, although the security be such as may be proved under the commission, by 7 Geo. 1. c. 31. So, the 49 Geo. 3. extends only to the proving such debts under the commission. A petitioning creditor must have a debt which can be enforced by law. As, therefore, the collector could not enforce payment of the assessments on the day he called, he could not be deemed a creditor of the bankrupt, for he could not then sue him or have his remedy by distress. The denial to him, there-

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(a) 7 Vin. Abr. 61, pl. 14, tit. Creditor and Bankrupt.

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fore, did not afford any evidence of the bankrupt's keeping house with intent to delay a creditor, although it might be otherwise if such an intention had been proved.

Lord Chief Justice DALLAS.—A denial to a creditor does not of itself constitute an act of bankruptcy, but is only presumptive evidence of a beginning to keep house, which, if coupled with an intent to delay creditors, most clearly amounts to such an act. It has therefore been properly admitted in the course of the argument, that if there were a beginning to keep house with such an intent, it would have amounted to an act of bankruptcy. The learned Judge thought at the trial, that the denial to the collector of the rates in question was equivalent to a denial to a creditor, and the Jury found that there was a beginning to keep house, so as to constitute a specific act of bankruptcy. The case is therefore reduced to this single question, whether the collector was a creditor or not; viz. whether the sum he demanded from the bankrupt for the assessments in question, can be considered as a debt due at the time of making the demand, and it must be presumed that there was a debt due unless the contrary were shewn. I shall therefore confine myself to the act of bankruptcy as left to the Jury at the trial, as I think a denial to a creditor is evidence of a beginning to keep house, although it appears from the facts, as reported by the learned Judge, that there was sufficient evidence to constitute an act of bankruptcy by the party's absenting himself for the purpose of delaying his creditors. But I abstain from giving any positive opinion on this point. The order of denial was general, as it extended to any person that might happen to call. This denial, therefore, must necessarily extend to creditors, as well as those who were not so, and in *Round v. Byde* (a), it was decided, that a denial to a creditor in consequence of a general order to be denied to every person, was sufficient to constitute an

(a) Cooke's Bankrupt Laws, page 91.

act of bankruptcy. But it has been contended, that the collector was not a creditor, as he could not immediately sue the bankrupt for his debt. The argument, however, rests on fallacy, as it confounds the debt with the remedy, and assumes that the former cannot exist unless the debtor may be sued in the usual and ordinary manner. The sums due for those rates were created by an assessment. The collector was in the nature of an agent duly entitled to demand and receive them, and when the assessment was made, the debt was created, and might be immediately demanded. It seems to me, therefore, that in this case there was a debt due on the assessment's being made, and that the collector had a right to make a demand at the time he called, and the order of denial by the bankrupt was made with a view of postponing the payment of the rates. At all events, whatever remedy the collector might have, was postponed by such denial, because if he thought the bankrupt was at home, and had been denied to him, he would have immediately had recourse to those remedies which were afforded him by the statutes. This is not like a debt payable at a future day, for it was in fact due when the demand was made, and the party was then entitled to receive it. Confining myself, therefore, to this single point, I am of opinion, that this must be considered as a calling by a creditor within the intent and meaning of the bankrupt law, and further, as the bankrupt had given a general denial to all creditors and other persons, it was sufficient evidence of a beginning to keep house so as to constitute an act of bankruptcy.

Mr. Justice PARK.—I am of the same opinion. It is not necessary to consider whether an act of bankruptcy was committed by the bankrupt's absenting himself, and I shall therefore confine myself as to whether it may be deemed as a beginning to keep house with an intent to delay his creditors. There appears to be a great confusion in the text books on this point, as it is invariably stated, that a denial to creditors

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is an act of bankruptcy; but that is not so, it is merely evidence of a beginning to keep house which constitutes such an act. In *Bayly v. Schofield* (a) Mr. Justice Bayley said, "that it seemed to him, that where a trader remained in his bed-chamber for upwards of three weeks, it amounted to an act of bankruptcy;" and Lord *Ellenborough* has said, "suppose a man shut himself up in his bed-room for a fortnight, and give a general order of denial to all persons that might come, it would be a beginning to keep house with an intent to delay creditors, though no one should call." Although in *Garret v. Moule* (b) an actual denial was considered necessary, and the indispensable evidence of a beginning to keep house, still, such denial is now usually given in evidence to explain the equivocal act of the trader's keeping in his house, and to shew that he did so with intent to delay his creditors; for a denial is always open to explanation, as in the cases of sickness, company, particular business, or the lateness of the hour; and in *Smith v. Currie* (c), and *Shaw v. Thompson* (d), it was held, that a denial to a creditor when a trader is at his dinner, is not an act of bankruptcy, if the intention was only to avoid interruption at that hour, and not to delay the creditor, although such creditor be thereby delayed. This distinction was pointed out by Lord *Ellenborough* in *Robertson v. Liddell* (e), and his Lordship also observed (f), that "indeed the fact of delay in the case of a beginning to keep house was usually resorted to in evidence for the mere purpose of explaining an act which might otherwise be equivocal." So, in *Dudley v. Vaughan* (g), his Lordship said, that "though an authorised denial to a creditor, requiring to see his debtor, is the most usual and familiar evidence of a beginning to keep house within the meaning of the statute, still, it is not the only evidence by which this may be proved. That if a trader has no servant, the act cannot be evinced through such a

(a) 1 Maul. & Selw. 354.——(b) 5 Term Rep. 575.——(c) 3 Camp. 349.——(d) 1 Holt's Ni. Pri. Cas. 159.——(e) 9 East, 492.——(f) Id. 494.——(g) 1 Campb. 272.

medium, and generally, that if a trader seclude himself in his house to avoid the fair importunity of his creditors, who are thus deprived of the means of communicating with him, he begins to keep house within the meaning of the legislature, and commits an act of bankruptcy. Looking, therefore, at the principle laid down in those cases, which rests on a beginning to keep house with an intent to delay creditors, I am of opinion that there was evidence of such an intent in this case, so as to constitute an act of bankruptcy by a beginning to keep house. I am further of opinion, that the collector of the rates in question was in a situation to apply for them as a debt due at the time, and concur with the distinction as drawn by my Lord Chief Justice, as to the debt being due, and the effect the denial might have, in postponing the remedy of the collector.

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Mr. Justice BURROUGH.—In *Garret v. Moule*, I decided as an arbitrator, that in order to constitute an act of bankruptcy, the debtor must be denied to a creditor, with intent to hinder him, and that keeping house with that intent was not alone sufficient, on the ground that an actual denial was necessary, and the indispensable evidence of a beginning to keep house; and on a motion being made to set aside the award, Lord *Kenyon* doubted whether this construction should have been put on the statute at first, but that it having been obtained, he was afraid to disturb it. This, however, was afterwards doubted, and in the subsequent case of *Fowler v. Padget* (a), his Lordship, on adverting to the statute, was of opinion, that by reading the word “and” for “or,” as was frequently done in the construction of legal instruments, where the sense required it, all difficulty would be removed; and that construction was adopted by the Court of King’s Bench in *Robertson v. Liddell*, where it was held, that the departure of a trader from his dwelling house, with an intent to delay his creditors, was an act of bankruptcy, though no

(a) 7 Term Rep. 509.

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creditor was thereby in fact delayed. The same rule is applicable to a beginning to keep house, and this was so held, as the knowledge of the intent rested entirely with the bankrupt himself and his family, with which the creditor could have no possible means of being acquainted. The beginning to keep house is only put as one instance of an act of bankruptcy in the statute, and a denial to a creditor is strong evidence of the contemplation of such an act. But there are various other ways in which a trader may shew an intent to delay his creditors, and which would eventually amount to an act of bankruptcy, for instance, if he locked himself up in his bed-room, or, as in *Castell's* case (a), where the bankrupt left the place where he usually sat, and retired into a back room up stairs, and drew the curtains, in order to prevent his being seen; it was considered a sufficient act of bankruptcy. With respect to the nature of the debt, it is the duty of the inhabitants of a district to repair their highways, the poor contribute their labour, the rich their money, and the assessments levied on the latter, are only a composition in lieu of such labour. The rate is in the nature of a debt, and it is immaterial whether it be immediately suable or not, for if a remedy be given to recover the assessments due, they must stand in the same situation as debts which are usually suable. As soon as the assessment was made, it became a debt due to the collector, and he was empowered to enforce payment immediately. It therefore appears to me, that he might be considered as a creditor, and that a denial to him was sufficient. But it is unnecessary to determine this case on that point alone, as there was a beginning to keep house with an intent to delay creditors.

Mr. Justice RICHARDSON was absent.

Rule discharged (b).

(a) See 1 Maul. & Selw. 354.——(b) See *Chenoweth v. Hay*, Id. 676. *Ginmingham v. Laing*, 2 Marsh. 236.

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Ex parte MAYER.Tuesday,
Nov. 28.

MR. Serjt. *Vaughan* moved, that the applicant might be re-admitted an attorney of this Court, on an affidavit which stated, that he had been duly admitted in the year 1808, and had taken out his certificate, and practised in 1809; that in the latter part of that year he entered into trade, and from that time had discontinued to practise as an attorney, and that he was now desirous to be re-admitted; and that he had been guilty of no mal-practices since the time of his first admission.

If an attorney of this Court has entered into trade, and discontinued to practise for twelve years, the reasons for his quitting such trade must be satisfactorily explained before he can be re-admitted.

But, the Court observed, that from the length of time that had elapsed since such admission, they required a more full affidavit, in which the reasons for his quitting trade must be satisfactorily shewn, and that no cause of complaint existed against him.

END OF MICHAELMAS TERM.



C A S E S
 ARGUED AND DETERMINED
 IN THE
Courts of Common Pleas
 AND
Exchequer Chamber,
 IN HILARY TERM,

IN THE FIRST AND SECOND YEARS OF THE REIGN OF
 GEORGE IV.

HENRY WARTER and MARGARETTA MARY ELIZABETH WARTER, Infants, by their next Friend v. JOHN HUTCHINSON, surviving Trustee, and MARGARETTA ELIZABETH MEREDITH WARTER, an Infant, by JANE WARTER, Widow, her Mother and Guardian.—And JANE WARTER, Widow, and MARGARETTA ELIZABETH WARTER, an Infant, by the said JANE WARTER, her Mother and next Friend v. JOHN HUTCHINSON, HENRY WARTER, and MARGARETTA MARY ELIZABETH WARTER, Infants, by their Guardian. 1821.

THESE bills having been filed by the respective parties for the purpose of carrying into effect the trusts of the will hereinafter stated, and declaring the rights of the several parties, the causes came on to be heard before the Vice Chancellor, on the 17th March, 1820, when his Honour

Devise of lands, &c. charged with two annuities, and subject to certain legacies, to trustees their heirs and assigns, until

devisor's nephew A., son of his sister B., should attain twenty-one, and if he should die in the mean time, until C. second son of B. should arrive at that age, and if C. should die in the mean time, until the daughter of B. should attain twenty-one, upon trust, to raise out of the rents of the premises, or by sale or mortgage thereof, portions for C. and the younger children of B. payable on their attaining twenty-one, and further, to apply a proper sum out of the rents for the maintenance and education of A. till he should attain twenty-one, and then to pay him the residue, and if he should die before twenty-one, then to apply a like sum for the maintenance of C. till he should attain that age, and

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directed that a case, of which the following is the substance, should be stated for the opinion of the Judges of this Court.

Thomas Meredith, of Pentrebychan Hall, in the county of Denbigh, M. D. by his will bearing date the 8th September, 1801, duly executed and attested to pass real estates, after directing the payment of his debts and funeral expences by his trustees and executors thereafter named, and for which purpose he thereby charged, subjected, and made liable all his capital and other messuages, lands and hereditaments whatsoever, situate in the several counties of Denbigh and Chester, to the payment of the same, in aid of his personal estate, and subject thereto, he gave and devised all and every his said capital and other messuages, &c. tenements, lands, and hereditaments, with their respective appurtenances, to three trustees (of whom the said John Hutchinson was the survivor), their heirs and assigns, subject to the following uses and estates (that is to say): In trust, to permit and suffer his sister Margaretta Warter, the wife of Joseph Warter, and his aunt Mary Newton, to have, take and enjoy, out of the said hereditaments and premises for their respective lives, each, a certain annuity therein mentioned, with the usual power of entry and distress, and subject to those two several annuities, he gave and devised the said capital and other

then to pay him the residue, and in the mean time, to place out the money arising from the rents at interest for the benefit of A.; and when A. should attain twenty-one, or in case of his death, when, and as soon as C. should arrive at that age, or in case of his death, when the daughter of B. should attain twenty-one, to the use of A. and his assigns for life, sans waste, remainder to trustees to preserve contingent remainders; and after the death of A. to the use of his first and other sons, &c. in strict tail, and for default of such issue, to the use of C. with similar limitations over to his niece the daughter of B. and an ultimate remainder to B. in fee. The deviser also directed, that his plate and furniture should remain in his house as heir-looms. He died, leaving his sister B. her sons, A. and C. and three younger children alive. A. married and died intestate under twenty-one, leaving a daughter D.:—Held, first, that D. became entitled to the estates devised, as tenant in tail immediately on the death of her father, subject to the annuities and legacies as charged by the will. Secondly, that the heir-looms being personalty, vested absolutely in her on the death of her father; and thirdly, that the personal representative of A. was entitled to the savings of the rents and profits of the estates accrued in his life-time, subject to the said annuities and legacies.

messuages, &c. to the said trustees, their heirs and assigns, until his nephew, *John Warter*, the son of his sister *Margaretta Warter*, should attain the age of twenty-one years; and if he should die in the mean time, until *Henry Warter*, the second son of the said *Margaretta Warter*, should arrive at that age; and if the said *Henry Warter* should die in the mean time, until the daughter of the said *Margaretta* should arrive at that age, upon the following uses and trusts, (that is to say); that they the said trustees and the survivor of them, his heirs and assigns, should in the first place, as soon as conveniently might be after his decease, levy and raise out of the rents and profits of the premises, or by sale or mortgage thereof, any sum or sums of money as would be sufficient to pay and satisfy all his just debts and funeral expences, and all costs, charges, and expences which they the said trustees might sustain, on account of the trusts thereby in them reposed; and further, that they should levy and raise out of the rents and profits of the said premises, or by sale or mortgage thereof, or of a competent part thereof, the full sum of 2000*l.* together with all costs and charges attending the raising of the same, and pay the same to the said *Henry Warter*, the younger son of his sister the said *Margaretta Warter*, as soon as he attained the age of twenty-one years; and if his said sister should happen to have more than one younger child, then, and in such case, he directed his said trustees to raise, out of the rents, issues, and profits of the said premises, the full sum of 3000*l.* and pay the same to and amongst such younger children, share and share alike, as soon as they should severally attain their respective ages of twenty-one years; and he charged the said hereditaments with the payment of the same; and upon further trust, that they the said trustees, their heirs and assigns, should pay and apply a proper sum of money arising from the rents and profits of the said premises, for the maintenance and education of his nephew *John Warter*, till he should arrive at the age of twenty-one years; and when he should attain that age,

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tive body and bodies lawfully issuing, the
 nd sons, and the heirs male of his body
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 ing; and for default of such issue, to the
 new *Henry Warter*, the second son of the
 garetta *Warter*, and his assigns for life, without
 impeachment of waste; and immediately after the determin-
 ation of that estate, to the use of the said trustees, their heirs
 and assigns, to preserve the contingent uses and estates from
 being barred or destroyed; and from and after the decease of
 the said *Henry Warter*, to the use of his first, second, third,
 and other sons, and first, second, third, and other daughters,
 in like manner as to the sons and daughters of the said *John*
Warter; and for default of such issue, to the use of his niece,
 the last born child of his sister *Margaretta Warter*, and her
 assigns for life, without impeachment of waste; and after her
 decease, to the use of her sons and daughters in like manner
 as to the sons and daughters of the said *John* and *Henry*
Warter, and in default of such issue, to the use of his sister
Margaretta Warter in fee.—Provided always, and the tes-
 tator did thereby expressly declare it to be his will, that the said
John Warter, or whatsoever other person or persons should
 by virtue thereof become possessed of, or entitled to his said
 estates, should, from the time he, she, or they should be-

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then, upon further trust, to pay him the rest and residue of the said rents, issues, and profits of the said premises, if any should remain in their hands, after payment and satisfaction of all his just debts and funeral expences, and the said sum of 2000*l.* or 3000*l.* as the case might happen as aforesaid; and if the said *John Warter* should happen to die before he attained the age of twenty-one years, then, the trustees were to pay and apply a sufficient sum of the money arising from the rents and profits of the said premises, for the maintenance and education of his nephew the said *Henry Warter*, till he should attain the age of twenty-one years; and when *Henry Warter* should arrive at that age, then upon trust, to pay him the rest and residue of the rents, issues, and profits of the said premises, if any should remain in their hands, after payment and satisfaction of his just debts, and the money intended for his sister's younger children as aforesaid; and in the mean time, to place out the money arising from the rents and profits of the said premises, at interest, for their benefit and advantage; and when and as soon as the said *John Warter* should attain the age of twenty-one years, or in case of his death, when and as soon as the said *Henry Warter* should arrive at that age, or in case of his death, when and as soon as the daughter of the said *Margaretta Warter* should arrive at the age of twenty-one years, he gave and devised the said premises with their appurtenances, subject as aforesaid, to the said trustees, their heirs and assigns, to the use of his nephew the said *John Warter* and his assigns, for and during the term of his natural life, without impeachment of waste; and from and immediately after the determination of that estate, to the use and behoof of the said trustees, to preserve contingent remainders; and from and immediately after the decease of the said *John Warter*, to the use of the first, second, third, and all and every other son and sons of the body of the said *John Warter*, lawfully issuing, severally, successively, and in remainder, as they and every of them should be in priority of birth and seniority of age, and of the several and respective heirs male of his

and their respective body and bodies lawfully issuing, the elder of such son and sons, and the heirs male of his body issuing, being always to be preferred, and take before the younger of them, and the heirs male of his and their body and bodies issuing; and in default of such issue, to the use of the first, second, third, and all and every other daughter and daughters of the body of the said *John Warter*, lawfully issuing, severally, successively, and in remainder, one after another, as they and every of them should be in seniority of age and priority of birth, and of the heirs male of the respective body and bodies of such first and other daughters lawfully issuing, the elder of such daughter and daughters, and the heirs male of her and their body and bodies issuing, always to be preferred, and to take before the younger of them, and the heirs male of her and their body and bodies issuing; and for default of such issue, to the use of his nephew *Henry Warter*, the second son of the said *Margaretta Warter*, and his assigns for life, without impeachment of waste; and immediately after the determination of that estate, to the use of the said trustees, their heirs and assigns, to preserve the contingent uses and estates from being barred or destroyed; and from and after the decease of the said *Henry Warter*, to the use of his first, second, third, and other sons, and first, second, third, and other daughters, in like manner as to the sons and daughters of the said *John Warter*; and for default of such issue, to the use of his niece, the last born child of his sister *Margaretta Warter*, and her assigns for life, without impeachment of waste; and after her decease, to the use of her sons and daughters in like manner as to the sons and daughters of the said *John* and *Henry Warter*, and in default of such issue, to the use of his sister *Margaretta Warter* in fee.—Provided always, and the testator did thereby expressly declare it to be his will, that the said *John Warter*, or whatsoever other person or persons should by virtue thereof become possessed of, or entitled to his said estates, should, from the time he, she, or they should be-

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come so possessed, take upon himself, herself, or themselves, the surname of *Meredith*, and should make the mansion house of *Pentrebychan Hall* aforesaid, their usual and common place of residence; and in case the said *John Warter* should refuse or neglect to reside at, and make use of *Pentrebychan Hall* as his usual place of residence, and take upon himself the surname of *Meredith*, then the will was to be void to all intents with respect to him, and every other person and persons claiming under him, who should so refuse to comply with such direction; and in like manner he directed, that the same should be utterly void in respect to the said *Henry Warter*, and the daughter of *Margaretta Warter*, and every other person and persons claiming under them by virtue of his will, in case he, or they, should refuse to take the surname of *Meredith*, and reside at *Pentrebychan Hall* as aforesaid. And as to all his household goods and furniture, and all his silver plate whatsoever, that should happen to be at his mansion house at *Pentrebychan Hall*, at the time of his death, he ordered that the same or any part thereof, should not be sold, disposed of, or removed from thence, but that the same and every part thereof, should be deemed and considered to be, go, and continue heir-looms, for the use and benefit of the heirs of *Pentrebychan Hall* for ever; of which will the testator appointed *Richard Edwards*, and his aunt, *Mary Newton*, executors.

The testator having died, his will was proved in the Consistory Court of *Saint Asaph* by both the executors. *Joseph Warter* and *Margaretta* his wife, *John Richard Meredith Warter* (in the will called *John Warter*) their eldest son, and *Henry Warter* their second son, (also named in the said will,) survived the testator, and the said *Joseph Warter* and *Margaretta* his wife, also had living at the death of the testator, three other younger children, viz. *Joseph*, *Thomas*, and *Margaretta Mary Elizabeth*, being the daughter mentioned in the will.

John Richard Meredith Warter on the 5th August,

1816, duly intermarried with *Jane Jones*, and on the 6th April, 1817, died intestate, without having attained his age of twenty-one years, leaving the said *Jane Warter*, his widow, and *Margaretta Elizabeth Meredith Warter*, his only child by her, and heir at law, him surviving.

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The questions for the opinion of the Court were, first, whether upon the death of the said *John Richard Meredith Warter*, under the age of twenty-one years, the said *Margaretta Elizabeth Meredith Warter*, his only child, became, and is now entitled, as tenant in tail male, to the said devised estates and premises, either as a legal or equitable estate; and whether she was entitled to the possession of the said premises, immediately on the death of her father, or at any and what subsequent period of time. Secondly, whether the articles directed to pass as heir-looms, being personalty, vested in her absolutely; and whether she on the death of her father, or at what other period, was entitled to the possession thereof. And thirdly, whether the said infant child of the said *John Richard Meredith Warter*, his widow, or the said *Henry Warter*, was entitled to the savings of the rents and profits of the estates accrued due in the life-time of the said *John Richard Meredith Warter*?

This case was twice argued, first in the last *Trinity Term* by Mr. Serjt. Peake, for *Margaretta Elizabeth Meredith Warter*, and by Mr. Serjt. Blosset for *Henry Warter*; and again in the last Term by Mr. Serjt. Lens for the former, and by Mr. Serjt. Vaughan for the latter.

For *Margaretta Elizabeth Meredith Warter*, it was contended, that her father took a vested estate immediately on the death of the testator, although he was not to enter into possession until he attained the age of twenty-one, and as he died before he attained that age, his daughter took an estate in tail male. And further, that the heir-looms vested absolutely in her on his death, and that she at the same time became en-

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titled to the savings of the rents of the estates, which accrued in the life-time of her father. The whole of the will must be taken together, and it is necessary to consider what estates all the respective parties therein named took. There are two sets of provisions, the one relative to the maintenance and education of the parties who may become entitled to the estate while under the age of twenty-one, and the other, shewing the intention of the testator as to what time they should succeed to the property.—In the first place, the trustees took a mere chattel interest, for although the devise is to them, *their heirs and assigns*, it is clear, that it was the intention of the testator that they should not have any larger estate than was sufficient to enable them to perform the trusts of the will. In Sir *William Cordell's* case (a) there was a devise to executors for the payment of testator's debts, and until his debts should be paid, remainder to his brother for life; and after his death the debts were paid, and the question was, what interest or estate the executors had, and it was resolved, that they had but a chattel interest, for that if they should be deemed to have a freehold for their lives, then their estate would determine by their death, and not go to the executors of the executors, and so the debts would remain unpaid; but that the law adjudged it a particular interest in the land, which should go to the executors of the executors, as assets for payment of the debts of the testator. In *Doe d. Lee Compere v. Hicks* (b), where, after a devise to one for life, the deviser limited the estate to trustees and *their heirs*, in trust, to preserve contingent remainders, and to permit the tenant for life to take the profits, with remainder over on his decease; and he afterwards gave other estates for lives, with several remainders over, and after each estate for life, he interposed the same estate to trustees and their heirs:—it was held, that this shewed the intent of the testator to be, that the estates to the trustees should be confined to the lives

(a) Cro. Eliz. 315. S. C. cited in *Manning's Case*, 8 Rep. 96 (a).
 (b) 7 Term Rep. 433.

of the several tenants for lives, and consequently, that those in remainder took legal estates, there being no other circumstances in the will to shew a contrary intent; and Lord *Kenyon* there said (a) "We are to collect the devisors intention from the whole will; and taking it altogether, it appears that he intended that the trustees should only take during the lives of the several tenants for life, in order to protect the contingent remainders, though the words 'during the life of the tenant for life,' were not inserted in the will in the limitations to the trustees, and that it was not necessary that they should take the legal estate for a longer term than during the lives of the tenants for lives, since this construction would best answer the intention of the testator." The same rule was adopted by Sir *William Grant* in *Curtis v. Price* (b) where it was held, that a remainder in fee by settlement to trustees, was limited to the life of the tenant for life, although not so expressed; and his Honour there observed (c), that "the case of *Doe v. Hicks* was very much in point; where, though the limitation to the trustees was not expressed to be confined, yet it was construed to operate only for the lives of the several tenants for life." Here, as far as intent can be judged of, it was not the meaning of the testator to give the trustees an absolute estate, and although it may be contended, that it might be incumbent on them to raise two or three thousand pounds by sale or mortgage, still, the testator merely charged his estate for the payment of those sums, which only gave the trustees a limited power to that extent, and not an absolute estate. In *Liefe v. Saltingstone* (d) it was determined, that where *A.* devised to his wife for life, and by her to be disposed of to such of *A.*'s children as she should think fit, it gave the wife but an estate for her own life, with a power to dispose of it in fee;—on the ground, that she could not take a larger estate to herself by implication than an estate for life, because an estate for life was given to her by express limitation.

(a) 7 Term Rep. 437.—(b) 12 Ves. 89.—(c) Id. 100.—(d) 1 Mod. 189.

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So, here, the trustees can only take a limited estate, viz. until either of the testator's nephews or niece should attain the age of twenty-one. The same point was decided in *Dighton v. Tomlinson* (a), where the devise was to testator's wife for life, and then to be at her disposal, provided it was to any of his children, if living, if not, to any of his kindred that his wife should please. In *Yates v. Compton* (b) executors were directed by their testator to sell his land, and with the money arising by that sale and the surplus of his personal estate, to purchase an annuity for J. S. for her life; and it was held, that there was a power only, and no estate devised to the executors, although it was contended, that the power of sale continued in them. But the general rule is laid down by Lord *Ellenborough* in *Doe, d. White v. Simpson* (c) who observed, "that it appeared to be a fair inference from previous authorities, that where the purposes of a trust can be answered by a less estate than a fee simple, that a greater interest than is sufficient to answer such purpose, shall not pass to trustees, but that the uses in remainder, limited on such lesser estate so given to them, shall be executed by the statute." Secondly, the devise to *John Richard Meredith Warter* vested the estate in him immediately on the death of the testator, with remainder to his daughter *Margaretta Elizabeth* in tail-male. The testator did not intend that his nephew *Henry* should take more than a younger child's portion, unless in the case of a total failure of issue of the body of *John Richard Meredith*, and there are no words in the will, which import that his living to the age of twenty-one, must be taken to be a condition precedent to his being entitled to the estate, for that provision was merely introduced to shew the time when he should come into the management of it. It was not devised to him *in case* of his attaining that age, but was vested in the trustees *until* he should become twenty-one, when he

(a) 1 Com. Rep. 194. S. C. (in error). 1 Peere Wms. 149.—  
 (b) 2 Peere Wms. 308.—(c) 5 East, 171.



be capable of taking possession. The doctrine of action as being particularly applicable to this part of the case, is laid down by Lord *Manfield* in *Goodtitle*, d. *ard v. Whitby* (a), viz. "that where an absolute promise is given, and a particular interest given in the mean time as *until* the devisee shall come of age, &c.; and *when* he shall come of age, &c. *then* to him, &c.:" the rule is, that the promise shall not operate as a condition precedent, but as a condition of the time when the remainder-man is to take possession;" and his Lordship further observed in that case that "upon the reason of the thing, the infant was the object of the testator's bounty: and that the latter did not intend to deprive him of it in any event." So, here, the object of the testator's bounty married, and died before attaining the age of twenty-one, leaving a child:—Could the testator intend that in an event to disinherit such child? Certainly not. *ton's Case* (b) and *Manfield v. Dugard* (c) are authorities in support of that position. In the former, there was a devise of land to *A.* and *B.* for eight years, and after that time to remain to the testator's executors until such time as *A.* should accomplish his full age of twenty-one years, when he should attain that age, then the testator willed, that *B.* should enjoy the lands for him and his heirs for ever. *A.* died under twenty-one, and it was held, that the devise was nothing else in effect, than a devise to the executors till *H. B.* attained the age of twenty-one, remainder to *A.* in fee. *Manfield v. Dugard* is, if possible, a stronger case than the present. There, the testator devised to his wife, that when his son should attain the age of twenty-one, and when he should attain that age, then to him and his heirs, and the son died at the age of thirteen; it was held, that the wife's devise was determined on his decease, and that the remainder was in the son upon the testator's death, and did not depend on the contingency of his attaining twenty-one. So, in

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Burr. 233.—(b) 3 Rep. 21. S. C. Fearn, 7th edit. 242.  
4. Cas. Abr. 195, pl. 4. S. C. Gilb. Eq. Rep. 36. Fearn, 245.

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*Denn, d. Satterthwaite v. Satterthwaite* (a) upon a devise to *A.* for the use of *B.* till *B.* attained the age of twenty-one, and then to *B.* in fee, it was held, that the fee vested immediately in him. In *Doe, d. Wheedon v. Lea* (b) there was a devise to trustees "until *A.* should attain the age of twenty-four, on condition that they repaired the premises, and when and so soon as he should attain that age to him in fee," and it was held to give *A.* a vested interest, which would descend to his heirs, though he died before twenty-four, as the word *when* was not conditional, but denoted the time when the remainder was to take effect in possession. In *Tomkins v. Tomkins*, cited by Lord Mansfield (c) where the devise was to testator's brother, in trust for his eldest son *B.* till he should attain the age of twenty-one; and if he should die before he attained that age;—then a devise over: it was held, that the age of twenty-one was no limitation of *B.*'s interest, but only a limitation of the trust during his minority; and that he took the whole by implication. On these authorities, therefore, it is quite clear, that the testator intended that his nephew *Henry* should take nothing except in the case of failure of issue by his brother *John Richard Meredith*, who consequently took a vested estate immediately on the death of the devisor, with a remainder to his issue in fee. That being established, it is equally clear, that *Margaretta Elizabeth Meredith Warter* became entitled to the heir-looms, being personalty, on the death of her father. There might be some difficulty as to the savings of the rents and profits of the estates which accrued due in his life-time, but if the whole of the will be taken together, the testator intended, that such rents and profits should go to the person who was entitled to the estate; and the case of *Manfield v. Dugard* is an authority to shew that the rents and profits must follow the estate. The case of *Carr v. The Earl of Erroll* (d) is decisive to shew, that the heir-looms vested in the testator's nephew *John Richard Meredith Warter* when

(a) 1 Sir W. Bl. 519.—(b) 3 Term Rep. 41.—(c) 1 Barr. 234.  
 (d) 14 Ves. 478.

the estate vested, and that his daughter *Margaretta Elizabeth* was entitled to them on his death; for in that case, the testator directed that all his plate, furniture, &c. at his mansion-house, should remain there as heir-looms, and devised the same to trustees upon trust, to permit the same to go together with the mansion-house, to such persons as should from time to time be entitled to it, for so long time as the rules of law and equity would permit, and devised his real estates to trustees to the use of several persons, and their first and other sons, &c. successively, in strict settlement; and it was held, that the absolute interest in the personal chattels, vested in the first tenant in tail, and upon his death under age, passed to his representative; and the cases of *Foley v. Burnell* (a) and *Vaughan v. Burslem* (b) established the rule, that under such a limitation of chattels personal, the absolute interest would vest in the first person taking an estate tail in the freehold estate.

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For *Henry Warter* it was submitted, that the first question was, whether, under this will, the trustees took a chattel interest, or an interest in the estate in fee. It must be admitted, that where a devise is made to trustees for a particular object, as until parties attain a certain age, it is to be considered as a chattel interest, but for the purposes of the trust in the present case, no such object appears; such interest indeed, would be wholly inconsistent with the terms of the will. The annuities were granted absolutely for lives, and were not confined to determinate or indeterminate terms. Further, the devise was absolute to the trustees and their heirs, and coupled with an authority for them to raise money by sale or mortgage of any part of the property. This, therefore, is not to be considered as a mere naked power by the introduction of any subsequent words, as the estate was given to them and their heirs in the first instance, and they must necessarily have taken a legal undeterminable

(a) 1 Bro. Chan. Cas. 274. — (b) 3 Bro. Chan. Cas. 101.

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estate in fee, in order to be enabled to convey to a purchaser. (a) All the cases that have been relied on for *Margaretta Elizabeth Meredith Warter*, were those of mere naked powers of appointment, in which no absolute interest was vested in trustees and their heirs. Here, therefore, it is quite clear, that the trustees took a freehold interest at least. The second, and most material question is, how the testator intended that the estate should vest most beneficially in his nephews and niece, whom he selected as the objects of his bounty, and how they should succeed each other. For that purpose, it is necessary to look to the whole of the will, and the rule is, that the intention must prevail, if it be consistent with the rules of law; but such intention must appear on the face of the will. *John Richard Meredith Warter*, therefore, took an estate for life, with remainder to his sons and daughters in succession, and the estate tail to them was defeasable, in case of his death before twenty-one. The event which has happened, was undoubtedly never contemplated by the testator, for no intention is expressed by him to provide for the issue of his nephew *John Richard Meredith*, in case of his marrying, dying, and leaving issue before he attained twenty-one. But the question is, not what the testator would have done had he contemplated it, but what he has done. Although the will may be peculiarly framed, yet, if the whole of it be attended to, there can be no difficulty in saying that the testator had in view the possibility of *John Richard Meredith's* dying without issue before twenty-one, and for that event he has provided, by directing the profits to go over to *Henry*; so, as to the vesting the property in his niece, the only difficulty is in the phraseology of the will. There are, in point of fact, three distinct conditions and limitations, which, although they appear to be connected in the will, must be read *reddendo singula singulis*, which will make it intelligible. It is necessary to observe, that the words here are in default of such issue; and from the cases

(a) See *Bagshaw v. Spencer*, 2 Atk. 570. 577. *Wright v. Pearson*, 1 Eden, 119.

of *Foster v. Lord Romney* (h), *Denne d. Briddon v. Page* (b), and *Hay v. The Earl of Coventry* (c), it appears, that the word *such* was deemed a relative, and restrained those which accompanied it, and applied only to the issue of those who were previously named in the will. Here, therefore, the words *such issue* must be confined to children which *John Richard Meredith Warter* might have, after he had attained the age of twenty-one, for until then, he could not be entitled to enter into the legal possession of the estate. The case of *Doe d. Wheedon v. Lea* (d), in which the doctrine laid down in *Boraston's Case* (e), *Manfield v. Dugard* (f), and *Goodtitle d. Hayward v. Whitby* (g), was recognized and established, does not go the length of shewing that *John Richard Meredith Warter's* living until he should attain the age of twenty-one, was not intended by the testator as a condition precedent to his being entitled to the estate. It was admitted in all those cases, that the words "if" or "in case of," raised a condition precedent. Here, the trustees were directed, after payment of the maintenance and education of the nephews, to place out the money arising from the rents at interest, for their benefit, and that as soon as *John* should attain twenty-one, or in case of his death, as soon as *Henry* should arrive at that age, or in case of his death, when and as soon as the daughter of *Margaretta* should attain the age of twenty-one. The testator therefore devised the premises to the trustees to the uses therein specified. By this part of the devise, there was a specific disposition of rents, which is perfectly clear and intelligible, and if *John Richard Meredith* died under twenty-one, the accumulations or savings were to be paid over to *Henry*, with a similar limitation to the niece. Here, therefore, are words of condition, and coupled with the other parts of the will, shew, that it was not the intention of the testator to specify any particular time when *John Richard*

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(a) 11 East, 594.—(b) Id. 603, n.—(c) 3 Term Rep. 83.  
 (d) Id. 41.—(e) 3 Rep. 19.—(f) 1 Eq. Cas. Abr. 195.—(g) 1 Burr.  
 228.

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*Meredith Warter* should come into the control of the property. Even supposing that the provision as to *John Richard Meredith Warter's* dying before twenty-one, was not a condition precedent, yet, it is a condition subsequent, which, on his dying before he attained that age, divested the estate, which vested in him on the death of the testator. The case of *Stocker v. Edwards (a)*, is precisely in point in support of this position, where there was a surrender of copyhold to the use of the surrenderor for life, and afterwards to the use of his youngest son, and the heirs of his body, if he attained the age of eighteen, and if he died before eighteen without issue male, then to his right heir, it was held to be a condition subsequent with respect to the youngest son, and, therefore, the remainder vested immediately, subject to be defeated by the condition of his dying without issue male before he attained the age of eighteen. Whether the provision in question be a condition precedent or subsequent, the intent of the testator must be attended to. In the early part of the will, there is no reference to *John Richard Meredith Warter's* dying without issue, but merely his dying under twenty-one. The testator, therefore, never contemplated that he would marry, have a child, and die under that age, for *nec voluit, nec dixit*. Besides, it is scarcely reasonable to suppose, that he could have contemplated the event which has happened. The case of *Brownson v. Edwards (b)*, is somewhat similar to the present, where there was a devise to two trustees and their heirs, to receive the rents until *B.* should attain twenty-one, and if *B.* should attain that age or have issue, then to *B.* and the heirs of his body; but if *B.* should happen to die before twenty-one, and without issue, remainder over; and *B.* attained his age of twenty-one, and died without issue:—Lord *Hardwicke*, considering the word *and* as used for *or*, and the condition as disjunctive, instead of copulative; decreed, that the remainder over should take effect upon the apparent

(a) 2 Show. 398. S. C. nomine *Edwards v. Hammond*, 3 Lev. 132.

(b) 2 Ves. 243.

intent of the testator, that is, that it should take place either in default of *B.*'s attaining twenty-one, or on his dying without issue. Suppose, in that part of the will which devises the estate, the testator had given it to *John Richard Meredith Warter* for life, remainder to his sons and daughters in strict settlement, but in case he should die under twenty-one, then over; would not that have prevented the children from taking, if he had not arrived at that age; and how does the present differ in effect from such a devise? In *Manfield v. Dugard*, and that class of cases, there was no ulterior provisions as to rents and profits, but here, they were to accumulate, and be paid to *Henry* in case *John Richard Meredith Warter* died under the age of twenty-one. The case of *Bromfield v. Crowder* (a), is also applicable to the present. There, the testator devised to *A.* for life, and after his death to *B.* for life, and at the decease of *A.* and *B.*, or the survivor, he gave all his real estate to *C.* if he should live to attain twenty-one; but in case *C.* should die before that age, and *D.* should survive him, in that case to *D.* if he should live to attain twenty-one, but not otherwise; but in case both *C.* and *D.* should die before either of them attained twenty-one, then to *E.* in fee; and it was held, that *C.* took a vested estate in fee-simple, determinable on the contingency of his dying under twenty-one. There, the record of the case of *Edwards v. Hammond*, was searched for and produced, by the desire of the Court, and it was found that that case was inaccurately reported, as the words *issue male*, were not used in the will, as stated in the report. In *Doe d. Hunt v. Moore* (b), it was held, that a devise in fee "to *A.* when he attains twenty-one, but in case he dies before twenty-one, then over," was an immediate vested interest, liable to be divested on his dying under that age. Cases have been cited, to shew that the testator did not intend to vest the legal estate in the trustees, but in the devisees;—that, however, turns on the general proposition, and cannot be resorted to, so as to control the former part of

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(a) 1 New Rep. 313.—(b) 14 East, 601.

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the will, and as the legal estate was thereby vested in them, it cannot be narrowed or cut down by the subsequent parts for when an express estate is given in the first instance, no estate can arise by implication. As the first words of the will, therefore, admit of no doubt, and as the other points are so connected with the main question, it is unnecessary to comment on them; and Lord *Kenyon*, in delivering his opinion in *Denn d. Radclyffe v. Bagshaw* (a), observed in substance, that unless the intent be manifest on the face of a will, however hard the case may be, legal principles must apply;—and that that was a case in which he found his wishes in opposition to what he was bound judicially to decide. As to the heir-looms, it is quite clear, that they vested in the first taker of the estate in tail, and although it may not be adjudged that the trustees were entitled to an absolute estate in fee, still, they took a sufficient interest for the purposes mentioned in the will.

In reply, it was contended, that the two sets of provisions in the will were indivisible, and must be taken together. The cases which have been relied on for *Henry Warter*, are inapplicable to the present, as they only relate to the different provisions of this will, when construed singly and separately. The trustees merely took a chattel interest, subject to the annuities and the sums charged on the estate by the testator. It is immaterial whether *John Richard Meredith Warter's* dying under twenty-one, was a condition precedent or subsequent, as he took a vested estate immediately on the death of the testator; and the case of *Manfield v. Dugard*, is equally strong to shew that this might be considered either as a condition precedent or subsequent. *Henry Warter* is not placed in the same situation by the testator as *John Richard Meredith*, unless the latter died without issue; but that contingency only refers to one of the provisions in the will, namely, as to the accumulation of the rent during his minority. The provision

(a) 6 Term Rep. 516.



for the support of *Henry Warter* during his infancy, was only on the supposition that he was to succeed to the estate on the death of his brother under twenty-one, and without issue. But as *John Richard Meredith Warter* had issue, a daughter, the estate was vested in her, as well as the rents that accumulated during his life-time. *Bromfield v. Crowder and Doe, d. Hunt v. Moore*, were decided on the particular provisions contained in the wills therein set out. As therefore, the whole of this will must be taken together, the Court can only effectuate the intention of the testator, by giving to *Margaretta Elizabeth Meredith Warter* a legal estate as tenant in tail male.

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*Cur. adv. vult.*

The following certificate was afterwards sent to the Vice-Chancellor :

This case has been argued before us by counsel ; we have considered it, and are of opinion,

First, That upon the death of the said *John Richard Meredith Warter*, under the age of twenty-one years, *Margaretta Elizabeth Meredith Warter*, his only child, became and is now entitled to the devised estates and premises, as tenant in tail male of the legal estate ; and that she was entitled to the possession of the said premises immediately on the death of her father, subject, however, to the annuities, debts, and legacies, charged by the will of the said *Thomas Meredith*.

Secondly, That the articles directed to pass as heir-looms, being personalty, vested absolutely in the said *Margaretta Elizabeth Meredith Warter*, on the death of her father, and that she was then entitled to the possession thereof ; and

Thirdly, that the personal representative of the said *John Richard Meredith Warter* is entitled to the savings of the rents and profits of the estates, accrued in the life-time of the

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 WARTER the said debts and legacies.
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 HUTCHINSON. R. DALLAS.
 J. A. PARK.
 J. BURROUGH.
 J. RICHARDSON.

Thursday,
 January 25.

WESTLEY v. JONES.

Where the de-
 fendant was
 served with a
 copy of a
capias, and a
 quarter of an
 hour after-
 wards, de-
 manded to see
 the original,
 which was re-
 fused by the
 officer, the
 Court set aside
 the service and
 subsequent
 proceedings.

MR. Serjt. *Bosanquet* on the last day of the last Term, having obtained a rule *nisi*, that the service of the copy of the writ of *capias* in this cause, and the subsequent proceedings thereon, might be set aside with costs, on an affidavit, which stated that the defendant was served with a copy of the writ, at the suit of the plaintiff, on the 11th of *November* last, and that at the time of the service, he required the officer to shew him the original, which the latter declined to do; that there was no one present at the time of service, but that the defendant having gone with the officer about two hundred yards, met a person by the name of *Austin*, and informed him that he had requested the officer to shew him the original process, and demanded it in the presence of *Austin*, when it was again refused:—

Mr. Serjt. *Hullock* now shewed cause, on an affidavit of the officer, who served the process, who stated that he saw the defendant on the day in question, on horseback, at the door of his house, and having informed him that he had something for him, gave him a copy of the writ, which he received, and having been informed by the officer that it was a copy of a writ at the suit of the plaintiff, he put it in his pocket, and made no request to see the original. That he then rode off, and in about a quarter of an hour afterwards,

for the first time, requested to see the original process. The learned Serjeant objected, that the defendant should have demanded to see the original process at the time the copy was served, and that as he did not require it till fifteen minutes afterwards, it was too late; that the officer was not bound to shew him the original, as he was only obliged to serve him with a copy; if it were not so, it would be necessary to state in the affidavit required by 12 Geo. 1. c. 29. that he shewed him the original. He relied on the case of *Worley v. Glover* (a), where the Court, in adverting to the mode of serving process under that statute, held, that it was not necessary to shew the party the original writ, as on the service of rules; as that act only required him to be served with a copy. At all events, as the defendant was served on the 11th November last, he should have applied earlier than the 28th, being the last day of *Michaelmas* Term, as he thereby prevented the plaintiff from obtaining a plea of this Term.

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Mr. Serjt. *Bosanquet* in support of the rule, relied on the case of *Edgar v. Farmer* (b), where it was held, that the service of process was bad, where the defendant demanded a sight of the original, and was refused.

Lord Chief Justice DALLAS.—On serving the copy of a *capias*, it is not necessary, though usual, to shew the original, unless demanded. Here, the defendant required to see the original a quarter of an hour after the copy was served, and his demand being made at that time, must be considered as part of the same transaction, and relating back to the time of the service.

Mr. Justice BURROUGH.—The affidavit of service is framed on the words of the statute 12 Geo. 1. c. 29. which only requires the party to be served with a copy. But under

(a) 2 Stra. 877.—(b) Cas. temp. Hardw. 138.

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the circumstances of this case, as the defendant demanded to see the original, the officer should have shewn it him. With respect to this application having been made too late, the defendant was not bound to apply, until the plaintiff had taken another step in the cause.

Mr. Justice PARK and Mr. Justice RICHARDSON concurring,

Rule absolute (a).

(a) See 1 Tidd, 7th edit. 190.

Friday,
 January 26.

BROWN v. KNILL.

In covenant for not repairing;— if the covenant to repair contains an exception of "casualties by fire," it is fatal on *non est factum* to state it in the declaration as a general covenant to repair, omitting the exception; and the Court will not allow the plaintiff to amend on payment of the costs of the trial; but leave him to his remedy, by bringing a fresh action.

THIS was an action of covenant on a lease for not repairing premises demised by the plaintiff to the defendant, for the term of seven years. The declaration stated the covenant in the indenture to be, "that the defendant should and would, at his costs and charges, well and sufficiently repair, uphold, and keep the demised premises in all needful and necessary repairs, as often as occasion should require, and at the expiration of the term, leave and yield up the same to the plaintiff, his executors, &c. being in every respect well and sufficiently repaired, together with all erections and improvements, as should at any time be erected and made thereon during the term." Breach, for non-repair. The defendant pleaded (*inter alia*) *non est factum*.

At the trial of the cause, before Lord Chief Justice Dallas, at Guildhall, at the Sittings after the last Term, on the production of the counterpart of the indenture, it was proved to have been executed by the defendant, and it appeared that it contained the above covenant to repair as often as occasion should require (*casualties by fire excepted*), when it was objected for the defendant, that this was a fatal

variance, and fell expressly within the case of *Tempany v. Burnand* (a) where Lord *Ellenborough* held a similar objection to be well founded;—and his Lordship considering that case undistinguishable from the present, accordingly directed a nonsuit.

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Mr. Serjt. *Vaughan* now moved for a rule *nisi*, that this nonsuit might be set aside and a new trial granted. He observed, that *Tempany v. Burnand* was a mere *Nisi Prius* decision, and could not be supported; that the exception in this case was a mere qualification, and did not amount to a condition precedent, and therefore need not have been set forth in the declaration. In the subsequent case of *Gordon v. Gordon* (b) it was held, that in covenant, it was no objection under the plea of *non est factum*, that the deed contained material qualifications of the covenants set out, which qualifications were not noticed in the declaration. That principle is applicable to the present case. Besides, the defendant might either have pleaded or given in evidence as a defence, that the premises were out of repair from a casualty by fire. Unless, therefore, the exception amounted to a condition precedent, it was not necessary for the plaintiff to set out more in his declaration than the express cause of action. In *Elliott v. Blake* (c) the defendant covenanted to deliver a certain quantity of saltpetre before such a day; on oyer it appeared, that the deed contained a proviso, that if any mischance happened by fire or water to disable him, that he should be excused; and he pleaded that he was disabled by accident of fire. On objection, that there was a variance between the deed on which the plaintiff declared, and that produced, the Court held, that he need not declare on more of the deed than the covenant, and that it was on the defendant's part to shew the proviso, which went by way of defeasance of the covenant. So, here, this was merely an exception

(a) 4 Camp. 20.—(b) 1 Stark. Ni. Pri. Rep. 294.—(c) 1 Lev. 88.

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or proviso. No distinction can be drawn between covenant and assumpsit. If an action of the latter description be brought against a carrier for the loss of goods, and he has qualified his contract by giving the usual notice to limit his responsibility to a certain sum, it is not necessary to set forth that qualification in the declaration. In *Comyns' Digest* (a) it is laid down, that where any estate or interest passes or vests immediately, and is to be defeated by a condition subsequent, or matter *ex post facto*, be it in the affirmative or negative, or to be performed by the plaintiff, or the defendant, or any other ;—performance of that matter need not be averred ;—as, if a grant be of an annuity to A. till he be advanced to a benefice ; A. in answer need not say that he is not yet advanced. On these authorities, therefore, the plaintiff was not bound to set forth the exception against fire in his declaration.

But the Court were clearly of opinion that this exception formed part of the covenant to repair, which the plaintiff had set out in his declaration as an absolute covenant to repair generally, whereas, it was qualified by the exception which ought to have been expressly shewn. And they observed, that if there be an exception in a contract, it must be set out, that here, the exception as to casualties by fire, rendered the covenant to repair conditional, which on the face of the declaration appeared to be absolute.

Rule refused (b).

Mr. Serjt. *Vaughan* then moved that the plaintiff might have leave to amend the record on payment of the costs of the trial, on the authority of *Halhead v. Abrahams* (c) where, after a nonsuit for a variance in an undefended action on a replevin bond, the record was permitted to be amended and a new trial had.

But the Court held, that that application was the

(a) Tit. Pleader, C. 57.——(b) See *Horsfall v. Testar*, ante, vol. i. page 89.——(c) 3 Taunt. 81.

ground of a separate motion, and that under the present circumstances, they would not allow the plaintiff to amend, as he might have done so before trial. He was thereby guilty of laches, and he must now resort to his remedy of bringing a fresh action against the defendant.

The learned Serjeant therefore took nothing by his motion.

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## RAWTREE v. KING and Another.

Friday,  
January 26.

THIS was an action of *assumpsit* for goods sold and delivered, and brought against the defendants as executors. At the trial, all matters in difference *in the cause*, were by consent, to be referred to an arbitrator, and the order of reference stated generally that "all matters in difference" between the parties were to be referred.

If all matters in difference *in the cause*, are agreed to be referred, and the Associate by mistake draws up the order of reference generally as to all matters in difference between the parties, it cannot be amended, but the parties must go down to another trial.

Mr. Serjt. *Taddy* having in the last Term obtained a rule *nisi*, that the order might be amended, by inserting the words "in this cause" after those of "all matters in difference,"

Mr. Serjt. *Hullock* now shewed cause, and Mr. Serjt. *Taddy* in support of the rule, submitted that it was a mere mistake of the Associate, and consequently, that there could be no legal objection to the amendment.

But the Court said, that they could not interfere; that the order of reference must be considered as a mere nullity, and that the effect would be, that the parties must go down to another trial.

Rule discharged.

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Saturday,  
January 27.

WARMSLEY v. ROBERT MACEY (a).

To an action of *assumpsit* against the defendant, as acceptor of a bill of exchange for 45*l.* he pleaded, after setting out the stat. 51 *Geo.* 3. c. 124. that the plaintiff sued out a writ of *capias ad respondendum* against him by the name of *Joseph*, for 45*l.* on an affidavit of debt made by the plaintiff's clerk, under which the defendant was arrested, and afterwards allowed to go at large by the sheriff. That the writ was afterwards altered, by inserting the name of *Robert* (the real name of the defendant) instead of *Joseph*, under which he was again arrested, without any fresh affidavit of debt, as required by that statute:—  
Held bad on special demurrer, as it did not go to the merits of the action, and as the defendant might either have pleaded in abatement, or moved to set aside the proceedings for irregularity.

THIS was an action of *assumpsit* brought by the plaintiff as drawer, against the defendant as acceptor of a bill of exchange for 45*l.* 11*s.* 9*d.* The declaration contained a count on the bill, counts for goods sold and delivered, and the common money counts. Plea, after setting out 12 *Geo.* 1. c. 29. and 5 *Geo.* 2. c. 27. as to the regulations in the execution of process, and that the same were made perpetual by 21 *Geo.* 2. c. 3. stated, that an act of parliament was afterwards passed in the 51 *Geo.* 3. by which it was enacted, "that no person should be held to special bail upon any process issuing out of any Court where the cause of action should not have originally amounted to 15*l.* or upwards, &c. and that in all cases where the cause of action should not amount to that sum, and the plaintiff should proceed by the way of process against the person, he should not arrest the body of the defendant, but serve him personally, within the jurisdiction of the Court, with a copy of the process and proceedings thereupon, in such manner as was directed by the 12 *Geo.* 1. in cases where the cause of action shall not amount to 10*l.* or upwards, &c. and that where the cause of action in any Court should not amount to 15*l.* no special writ, nor any process specially therein expressing the cause of action, should be sued forth, or issued from any Court, in order to compel any person to appear thereon in such Court, and that all proceedings and judgments that should be had on any such writ or process, should be void and of no effect." The defendant then averred, that by the law of England as it now stands, since the passing of the said several statutes, no person ought to be arrested or held to special bail, on any

(a) See ante, page 52.



process issuing out of the superior Courts, unless the cause of action against such person is of such amount as is specified by the last-mentioned act, in the cases therein in that behalf mentioned, and an affidavit shall have been first made and filed of the cause of action against such person, in pursuance of the several statutes in that case made and provided; nor ought any special writ or process, specially expressing the cause of action, to be sued forth, or issued from any Court, in order to compel any person to appear thereon in such Court, without such an affidavit being first made and filed. The plea then stated, that nevertheless, after the making of the said several acts, to wit, on the 27th October, 1820, the plaintiff commenced a certain action by means, or under colour of a certain writ of *capias ad respondendum*, issued out of this Court at the suit of the plaintiff, directed to the Sheriff of *Middlesex*, whereby he was commanded to take *JOSEPH Macey* and *Job! Doe*, and them safely keep, so that he might have their bodies before his Majesty's Justices at *Westminster*, on the morrow of *All Souls*, to answer the plaintiff in a plea, wherefore with force and arms the close of the plaintiff they broke, and other wrongs to him did, to the great damage of the plaintiff; and also that the said *Joseph Macey* might answer the plaintiff in a certain plea of trespass on the case upon promises, to the damage of the plaintiff, of 90*l.* which writ was marked or indorsed for bail for 45*l.* and upwards, by virtue of a certain affidavit of debt theretofore made and sworn by one *James Howe*, as the agent or clerk of the plaintiff in that behalf, and which writ was afterwards delivered to the sheriff to be executed in due form of law; and by virtue of which, the defendant was on the 28th October, 1820, arrested by the said sheriff at the suit of the plaintiff. The defendant then averred, that the arrest being illegal and void, the sheriff, to save himself from the consequences of the illegality thereof, afterwards released the defendant from the arrest, and allowed him to go at large whithersoever he would; that on the 31st Octo-

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*ber*, 1820, the plaintiff obtained from the sheriff the writ under which the defendant was arrested, and wrongfully and unlawfully changed and altered the same from being such writ against the said *Joseph Macey*, and made and converted it into a writ of a similar nature and effect, against the defendant *Robert Macey*, and issued the same as a good and lawful writ against him, and as being lawfully marked or indorsed for bail for the said sum of 45*l.* and upwards, and without any such affidavit being first made and filed, as is by law required for that purpose; the same being in fraud of his Majesty's revenue in that behalf, and contrary to the form and effect of the 51 *Geo. 3.* and the several other acts above mentioned. That the said writ so changed, altered, converted, and issued as last aforesaid, was delivered by the plaintiff to the said sheriff, to be executed as a good and lawful writ, at the suit of the plaintiff against the defendant, and that the sheriff again arrested the defendant, by virtue or under colour thereof, and kept and detained him in prison for twenty-four hours then next following, and until the defendant, to procure his release and discharge from such last-mentioned imprisonment, on the 1st *November*, 1820, was obliged to, and did procure two persons to become bail to the sheriff for his appearance before the Justices of the Bench at *Westminster*, at the return of the said writ, so altered, converted, and indorsed as aforesaid, to answer the plaintiff in the plea in the said writ mentioned, according to the supposed exigency thereof; the same several premises being to the manifest wrong and injury of the defendant, and contrary to the form and effect of the 51 *Geo. 3.* and the several acts of parliament above mentioned. Wherefore the defendant said, that the said writ so issued and altered, converted and re-issued as aforesaid, and the second arrest of the defendant, as well as the declaration of the plaintiff in this behalf, and all other proceedings of the plaintiff in this suit, are absolutely bad, and void in law; and this, &c. wherefore, &c.

To this plea, the plaintiff demurred specially, and assigned for causes, that the plea was no answer to the plaintiff's declaration, or to the several causes of action therein mentioned and complained of, or any or either of them, and that the defendant had not in the said plea, traversed or denied the making and breach of the several promises and undertakings in the declaration mentioned, in manner and form as therein is alleged and complained of, or any or either of them, or set forth or alleged any matter in avoidance or satisfaction of such causes of action, or either of them, and that the facts stated in the plea, could not by law, or the rules of pleading, be properly made the subject of a plea, or be pleaded to the said action, or in bar thereof, but amount only to matter of supposed irregularity, and not to matter in bar, or answer to the declaration, or the causes of action therein mentioned, and that it was not in or by the said plea alleged against whom the writ therein mentioned, was in fact originally issued, or intended to be issued, or that the same had been or was issued against any other person than the defendant, or was not in fact originally issued and intended to be issued against the defendant, or that the christian name of *Joseph*, as originally inserted in the writ, was not a mere error or mistake in the christian name of the defendant, against whom the writ had been, and was in fact issued; and that it was not in or by the plea alleged, that the defendant was not in Court, or had not put in bail, and appeared therein, at the suit of the plaintiff in this action, at the time of his declaring therein against the defendant, or that the plaintiff was not then competent to declare against him in the said action, and that the plea was in various other respects uncertain, insufficient, and informal. The defendant joined in demurrer.

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The cause now came on for argument, when

Mr. Serjt. *Lawes*, in support of the demurrer, submitted, that the facts as pleaded, were no answer whatever to the debt or causes of action mentioned in the decla-

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ration, but if true, were mere matter of irregularity in the process, and should have been taken advantage of by motion to set aside the proceedings for irregularity, and not by plea in bar to the action, as it neither denied or avoided the contract as stated in the declaration, or shewed that the debt due from the defendant to the plaintiff, had been satisfied. If the writ were bad in the first instance, it might have been taken advantage of by a plea in abatement. Besides, no material issue can be taken on this plea, which does not go to the merits, and if it could be sustained, it might be pleaded in bar to a future action.

Mr. Serjt. *Pell*, *contra*, was stopped by the Court,

Who observed, that the plea could not be sustained, as it merely tended to shew, that the defendant had been irregularly brought into Court. That it did not go to the merits, nor could it deprive the plaintiff of any legal remedy he might have against the defendant, who might either have pleaded in abatement, or moved to set aside the proceedings for irregularity.

Judgment for the plaintiff (a).

(a) See *Bull v. Swan*, 1 Barn. & Ald. 390.

Saturday,  
 January 27.

TOMLINSON and Another v. WILKES, Esq. (a).

An assignee of a bankrupt, having released his claim as a creditor on the bankrupt's estate, is a competent witness to support the petitioning creditor's debt, as he merely stands in the situation of trustee to such estate.

THIS was an action on the case brought against the defendant as late sheriff of the county of *Essex*, for not levying and selling under a writ of *feri facias*, issued at the suit of the plaintiffs, on the 3d *May*, 1819, against the effects of one *James Shynn*, and for making an alleged false return to such writ.

At the trial of the cause, before Mr. Baron *Wood*, at the last Assizes at *Chelmsford*, the defence rested on an act

(a) See *Tomlinson v. Shynn*, ante, vol. iv. page 505.

of bankruptcy having been committed by *Shynn* before the sheriff entered under the writ. The trading and act of bankruptcy were admitted. In order to prove the petitioning creditor's debt, his son, who was also a creditor of *Shynn*, and had proved his debt under the commission, was called, when his testimony was objected to by the plaintiff's counsel;—but any dividend that might be received on that debt, or any claim he might have individually on the bankrupt's estate, was, in consequence of the objection, released by the witness at the trial; and the learned Judge then ruled that his evidence might be received. However, as it appeared that he was an assignee under the commission, as well as a creditor, it was also objected that he had still an interest by reason of his responsibility in that character, to the Commissioners named in the commission, as well as to the creditors who had or might prove debts under it. The Jury found a verdict for the defendant, but the point as to whether the testimony of this witness was, under the circumstances, admissible or not, was reserved for the opinion of the Court.

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Mr. Serjt. *Taddy* having in the last Term obtained a rule *nisi*, that this verdict might be set aside, and a new trial granted, on the ground, that the witness was interested in the event of the suit, as the sheriff was indemnified by the assignees, of whom he was one, and he contended, that although the witness had given a release of his individual claims on the bankrupt's estate, still, he could not be called to support his own credit on the commission under which he acted. A tenant in possession on whom an ejectment has been served, is not a competent witness in an action of ejectment in support of the title of the defendant under whom he holds, *Bourne v. Turner* (a), *Doe, d. Foster v. Williams* (b). Here, the assignee has an interest, as he is responsible to the Commissioners, and the

(a) 1 Str. 632.—(b) Cowp. 621.

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sheriff is not only indemnified by him, but defends the present action under such indemnity.

Mr. Serjt. *Pell* now shewed cause, and submitted, that as *Shynn* had committed an act of bankruptcy previously to the issuing the writ of *feri facias* at the suit of the plaintiffs, they were not entitled to take his property under it. The witness had no interest whatever as an assignee, and having released his individual claims on the bankrupt's estate as a creditor, he stood merely in the situation of trustee. As assignee, he was only empowered to collect the debts due to the bankrupt, and account to the Commissioners for the sums received by him in that capacity. If the Jury had found a verdict against the defendant, it could not be used in evidence against the witness, nor could he be called on as assignee for any loss the defendant might sustain as sheriff. On these grounds, therefore, he was neither directly, nor indirectly, interested in the event of this suit.

Mr. Serjt. *Taddy*, in support of the rule. The witness acted as assignee under the commission. The release of his claims on the bankrupt did not render him competent, as he had an interest as trustee for all the creditors who might prove under the commission, and by the assignment he was bound to indemnify the Commissioners. In *Buller's Nisi Prius* (a), it is stated, that Lord *Holt* determined, that a verdict with the evidence given, in an action brought by a carrier for goods delivered to him to be carried, shall be given in evidence in an action brought by the owner against the carrier for the same goods, for it is strong proof against him that he had the plaintiff's goods. So, here, if the defendant as sheriff, had refused to deliver the proceeds of the levy, and the assignees had brought an action against him for retaining the same, the verdict in this case might be

(a) 7th edit. by Bridgman, page 243.

given in evidence against him in such action. For the sheriff is a mere stakeholder, and may therefore be assimilated to a carrier. Although, therefore, the release given by the witness at the trial, may operate as a bar to any right he may have on the bankrupt's estate as a creditor, still, he has a trust coupled with an interest as an assignee under the commission.

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Lord Chief Justice DALLAS.—The release given at the trial only operated on the interest the witness had as a creditor on the bankrupt's estate. He still stood in the situation of assignee, and in that character must be considered as a mere trustee, whose trust was coupled with no personal interest. Whatever actions he might commence or defend, as assignee, could only be for the advantage of the bankrupt's estate. The general rule is, that a trustee having a trust not coupled with an interest, is a competent witness, and as in this case, the person whose testimony was admitted, stood only in that character, I think the verdict cannot be disturbed.

Mr. Justice PARK.—The competency of the witness was objected to in the first instance, as he was interested as a creditor, but on releasing his claims to the bankrupt's estate, the learned Judge who tried the cause, held, that this release rendered his testimony admissible. It does not appear that he had indemnified the sheriff, but in all probability the solicitor under the commission has done so. The witness, therefore, merely stood in the character of trustee. Although it has been contended that he has a trust coupled with an interest as assignee under the commission, yet, in *Phipps v. Pitcher* (a), it was held, that an executor, although he had duties to perform under a will, but taking no beneficial interest, was a competent witness.

(a) 2 Marsh. 20. S. C. 6 Taunt. 220.

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Mr. Justice BURROUGH.—The case cited from *Buller's Nisi Prius* has no application to the present, as the witness must be considered as a bare trustee, without any beneficial interest, and if he had such interest as a creditor under the commission, he released it at the trial. This case, therefore, falls within the principle laid down in *Goodtitle, d. Fowler v. Welford (b)*, where it was decided, that if a witness offers to surrender or release his interest, but the other party refuses to accept the release, the evidence of the witness may be received.

Mr. Justice RICHARDSON.—It has been contended, that this witness was interested, because, if the assignees had brought an action against the sheriff for withholding the fruits of the levy, the present verdict might be given in evidence in such action; still, however, the assignees would merely stand in the situation of trustees, and it is quite clear that the latter are competent witnesses, unless they are beneficially interested.

Rule discharged.

(a) 1 Doug. 139.

Saturday,  
 January 27.

PEAKE, *qui tam*, v. CARRINGTON.

In an action against the master of a vessel for penalties under the 34th section of the Pilot Act, 52 Geo. 3. c. 39. the declaration must allege that a licensed pilot offered the master to take charge of the vessel, or made such offer in his presence or hearing, and it is not sufficient merely to follow the general words of the statute. It seems also necessary to state when such offer was made.

THIS was an action of debt brought to recover certain penalties from the defendant, as master of an *East Indiaman*, for not taking a licensed pilot on board, as required by the 52 Geo. 3. c. 39. and was tried before Lord Chief Justice Abbott, at Maidstone, at the last Assizes for the county of



*Kent.* The declaration stated, by way of inducement, that after the passing of that act, and after the commission of the several offences in the first and the succeeding counts after mentioned, and before the commencement of this suit, the said several offences relating to causes in which pilots under the Lord Warden of the *Cinque Ports*, and Constable of *Dover Castle* were and are concerned, within the intent and meaning of the said act, to wit, on, &c. at *Gravesend*, in the County of *Kent*, the Lord Warden for the time being, (that is to say), the Right Honourable *R. Banks*, Earl of *Liverpool*, being such Warden, did in due manner, by virtue of the said act, by written certificate, certify his license and authority for the proceeding by the plaintiff, for the recovery in this suit, of the several penalties thereafter in that and the succeeding counts mentioned :

Here followed several counts, alleging different offences, but a verdict was found for the plaintiff on the last only, damages 20*l.* which stated, that heretofore, and after the passing of the said act, to wit, on, &c. at *Gravesend* aforesaid, the defendant being the master of a certain ship or vessel called *The General Murray*, did continue a certain unlicensed person, to wit, one *William White*, that is to say, did continue him in the pilotage of the said ship or vessel, to wit, from *Margate Roads* to *Gravesend*, after a pilot licensed to act within the limits in which the said ship or vessel then actually was, to wit, one *Edmund Gibbs*, had offered to take charge of the said ship or vessel, contrary to the form of the statute in such case made and provided ;—whereby, and by force of the said statute, the defendant hath forfeited for his said offence, the further sum of 50*l.* and thereby, and by force of the said statute, and by reason of the aforesaid license and authority of the said Lord Warden, an action hath accrued to the plaintiff, to demand from the defendant, the said sum of money so forfeited as last aforesaid, residue of the sum above demanded.

The defendant pleaded *nil debet*.

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Mr. Serjt. *Bosquet*, in the course of the last Term, had obtained a rule *nisi*, that the judgment in this case might be arrested on the following grounds. First, as to the inducement, that the action could not be supported without the license or consent of the Trinity House, as well as the Lord Warden, as by the second section of the statute, the one had the like powers of licensing fit persons as pilots as the other. Secondly, that it did not appear that this was a case in which the *Cinque Port* pilots were concerned, and that the consent of the Lord Warden for the prosecutor to proceed for the recovery of penalties incurred by masters of vessels piloted by any other than a licensed pilot, was, by the fifty-ninth section of that statute, confined to those cases only. The mere statement that the offences related to causes in which pilots under the Lord Warden of the *Cinque Ports* were concerned, is insufficient, as his jurisdiction extends to other than *Cinque Port* pilots. Thirdly, that by the second section, it should have been stated in the inducement that the offences related to causes in which pilots *appointed and licensed* by the Lord Warden were concerned, whereas it was merely alleged that they were *under* him.—Fourthly, as to the count on which the verdict was taken, and which was founded altogether on the thirty-fourth section of the statute (a), although the words of the act have been properly pursued, still, it was necessary to go further; it is merely alleged, that the defendant continued an unlicensed pilot, after

(a) By which it is enacted, that "it shall be lawful for any licensed pilot to supersede any person not licensed as a pilot, in the charge of any ship or vessel, within the limits of his license; and every master of any ship or vessel, who shall continue to act himself as a pilot, or who shall continue any unlicensed person, or any licensed person, acting out of the limits for which he is qualified as a pilot, after any pilot licensed to act within the limits in which such ship or vessel shall, then actually be, shall have offered to take charge of the ship or vessel; and every person assuming or continuing in the charge or conduct of any ship or vessel, without being duly licensed to act within the limits in which such ship or vessel shall actually be, after any pilot duly licensed and qualified to act in the premises, shall have offered to take charge of such ship or vessel; shall respectively forfeit, for every such offence, a sum not exceeding 50*l.* nor less than 20*l.*"

a proper one had offered to take charge of the ship, but it does not appear when that offer was made, or whether it was in the course of the voyage in which the defendant was then proceeding; neither is it averred, that he had notice of such an offer, or that it was made within his hearing, or that he continued an unlicensed pilot to act after such offer, contrary to the statute; but it was merely stated, that he continued him in the pilotage of the ship.

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Mr. Serjt. Taddy now shewed cause. The plaintiff has adopted and followed the very words of the statute in the last count of the declaration, which is all that was necessary for him to do. The certificate of the Lord Warden of the *Cinque Ports* was only required to enable him to sustain the action, as by the seventy-second section of the statute, the consent either of the Trinity House, or the Lord Warden, or his Lieutenant for the time being, is sufficient, in cases where penalties above 20*l.* may be recovered; and by the thirty-fourth section, a penalty of not more than 50*l.* nor less than 20*l.* is imposed, which in this case has been remitted to the latter sum. The pilot is properly described as being under the Warden of the *Cinque Ports*, and it must necessarily be inferred, that he was under his jurisdiction. It is stated, that the offences related to causes in which such pilots were concerned; and the eleventh section of the statute, gives increased penalties in case the masters of vessels neglect to facilitate the getting those pilots on board. With respect to the objections raised as to the last count of the declaration, that it did not appear when the licensed pilot offered himself to take charge of the ship, or whether he did so in the course of the voyage in question or not, or that such offer was made to the defendant, or that he had notice of it, it was averred, that he, as master of the vessel, continued an unlicensed person in pilotage of the ship, after a licensed pilot had offered to take charge of her. It must there-

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fore be inferred, that such offer was made to him, or to a person capable of accepting it. If it had been made to the boatswain, or to any one of the inferior officers in the presence of the master, it would have been sufficient. Besides, it was one consecutive act, and it was alleged, that the defendant was the master of the vessel on a certain day, and continued an unlicensed pilot on board, contrary to the statute. It must therefore be necessarily inferred, that a licensed pilot offered to take charge of the vessel on the voyage in question, and that such offer was made to the defendant, as he continued the unlicensed person in the pilotage after such offer was made. In the case of *The King v. Fuller (a)*, in an indictment on 37 Geo. 3. c. 70. making it felony to endeavour to seduce a soldier or sailor from their duty, it was held sufficient to follow the words of the statute, and charge an *endeavour* to incite, without specifying the means employed;— and that under a charge that *A.* endeavoured to incite *B.* to mutiny, being a soldier, knowledge of *B.*'s being a soldier must be implied. If he had been a sailor, he must necessarily have been acquitted. Here, the word *offer*, must be construed to have the same effect as *endeavour* in that case, and more particularly so, as the offence is alleged to have been committed according to the express words of the statute.

Mr. Serjt. *Bosanquet*, in support of the rule. The material objection is, that the defendant is not connected with the offence charged to him in the last count of the declaration, under which the penalty was sought to be recovered. It has been admitted, that the offer by the pilot to take charge of the vessel, should either have been made to the defendant or a person in his presence, to bring him within the provision of the statute, and there is no allegation of such an offer having been made. It is even doubtful, whether if such offer had been made to the boatswain or steersman, it would have been sufficient; at all events, it would not, unless

(a) 1 Bos. & Pul. 180.

it came to the knowledge of the master. How, therefore, can he be charged with a penalty, unless it appears on the face of the record, that he continued an unlicensed person on board, after a licensed pilot had offered him to take charge of the vessel? The case of *The King v. Fuller* is not applicable to the present, as there the person charged, was stated to have done the whole of the act *advisedly*, but here, it does not appear that the defendant knew the offer was made, or that the person previously engaged in the pilotage of the vessel was unlicensed, and he cannot be liable without an allegation and proof of those facts.

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Lord Chief Justice DALLAS.—It is quite clear, that in many cases it is not sufficient to pursue the words of a penal statute, by setting them out on the record, but it is necessary to go further, and state circumstances to connect the defendant with the alleged illegal transaction, so as to bring him within the operation of the act. It is laid down in *Hawkins's Pleas of the Crown* (a), that “the want of a direct allegation of any thing material in the description of the substance, nature, or manner of the crime, cannot be supplied by any intendment or implication whatsoever.” Here, the last count of the declaration on which the verdict was taken, states nothing whatever as to the time when the supposed offence was committed, nor that the offer to take charge of the ship was made to the defendant as master, or to whom. It might have been made to a person who did not form part of the ship's crew, and *non constat* that it might not have been made to a perfect stranger on shore. I therefore am of opinion, that it cannot be inferred that the offer was made to the defendant as master, or in his presence, and as it was not so averred on the face of the record, the count in question is insufficient to charge him with the penalty sought to be recovered therein.

(a) Book 2, c. 25. s. 62.

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Mr. Justice PARK.—I am of the same opinion. This being a recent statute, it appears that no objection similar to the present, has been before raised. If the master had been on shore, and the offer had been made to one of his officers on board, it would have been insufficient to fix him with the penalty. The case of *The King v. Fuller*, does not appear to me to be in point, and there it was held, that the word *advisedly* was equivalent to a *scienter*.

Mr. Justice BURROUGH.—In the case of *The King v. M'Gregor (a)*, in an indictment on the 39 Geo. 3. c. 85, against a servant for embezzling money received on his master's account, it was held, that it was not sufficient to follow the words of the statute, but that there must be a positive allegation that the money was the property of the master, as in other cases of larceny. It appears to me, that the count in question is not sufficient to fix the defendant with the penalty; the offer should have been made to him, or in his hearing. There is nothing to connect him with the offence, but his having continued to employ an unlicensed pilot. He might not have known that he was unlicensed, and the continuance does not appear to have been connected with the offer in the subsequent part of the count. In *The King v. Fuller*, the prisoner was charged, that he feloniously did maliciously and advisedly endeavour to seduce a person serving in his Majesty's forces by land, to commit an act of mutiny—and it was held, that an endeavour to seduce, was itself a fact, admitting of no definition or description, and that knowledge was necessarily included in the charge of endeavouring to seduce.

Mr. Justice RICHARDSON.—I fully concur with the Court in thinking, that it is not sufficient in all criminal or penal cases to follow the words of the statute in the indictment or declaration. In *The King v. Etherington* and

(a) 3 Bos. & Pul. 106.

*Brook (a)*, it was held, that an indictment for stealing in a dwelling-house, persons being therein and put in fear, must state, that the persons were put in fear *by the prisoners*, although on a motion in arrest of judgment, most of the Judges were at first inclined to think the indictment good, in pursuing the words of the statute 3 *Will. & Mary, c. 9. s. 1.* Here, it should have been averred, that the offer of the licensed pilot to take charge of the vessel, was made to the defendant as master, or that he had knowledge of it. I therefore think, that the count in question is defective, as for aught that appears on the face of it, such offer might have been made during the absence of the defendant.

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Rule absolute.

(a) 2 Leach's Crown Cas. 3d edit. 731. S. C. 2 East. Pl. Cr. 635.

BOWDEN v. WAITHMAN and Another.

Wednesday,  
Jan. 31.

**T**HIS was an action of debt brought to recover penalties under the 32 *Geo. 2. c. 28. s. 12.*, against the defendants, as Sheriffs of *London*, for the extortion of one of their officers, in taking 1*l. 3s. 6d.* on the discharge of a person in custody on mesne process, on his giving bail to the Sheriff.

At the trial of the cause, before Mr. Justice *Burrough*, at *Guildhall*, at the Sittings after the last Term, in order to connect the officer with the defendants, the writ was produced, on which the name of the former was indorsed; and the learned Judge was of opinion, that the indorsement was sufficient for that purpose, and that the sum demanded by

In an action of debt against a Sheriff, to recover penalties for the extortion of his officer, in taking a larger fee than was allowed on the discharge of a person out of custody on giving bail:—Held, that the indorsement of the name of the officer on the writ was sufficient to

connect him with the Sheriff, without shewing that such indorsement was made with his authority.

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the officer was more than he was authorized to take; and the Jury accordingly found a verdict for the plaintiff.

Mr. Serjt. *Vaughan* now moved for a rule *nisi*, that this verdict might be set aside, and a new trial granted, and among other objections, contended, that although the name of the officer was indorsed on the writ, still, it was not sufficient to make the defendants responsible as Sheriffs, without proving that his name was written upon it by their authority, or with their privity; and he relied on the case of *Hill v. Leigh* and *Reay (a)*.

Mr. Justice BURROUGH referred to the case of *Fermor v. Phillips (b)*, as being precisely in point; and Mr. Justice

(a) *Holt's Ni. Pri. Cas.* 217.

(b) *FERMOR, Esq. v. PHILLIPS, Esq. Sheriff of Oxfordshire.*

Where, in an action for an escape against the Sheriff, the writ in the former action was produced, to connect him with his officer, on which was indorsed, "Warrant to B," who, on being called, stated, that he had delivered the warrant to another, who did not produce it:—  
Held, that it should have been left to the Jury to say, whether B. acted under the authority of the Sheriff, the indorsement being *prima facie* evidence that he did so act.

THIS cause was tried before Mr. Justice Burrough, at the Sittings in *Middlesex*, after *Hilary Term*, 1817. It was an action for an escape. To connect the defendant with his officer *Bloxham*, the writ and return in the former action, were produced from the *Custos Brevium* office. The Sheriff had returned, that he had arrested the defendant in the former cause, and that he had by force rescued himself. On the back of the writ were these words, "Warrant to *Bloxham*, 6th November, 1816." *Bloxham* the officer was called, who swore, that before he was subpoenaed, he had delivered the warrant to his attorney. The attorney was then called, who was also attorney for the Sheriff, and it appeared that he had been served with an insufficient notice to produce the warrant, and it was consequently not given in evidence.

The learned Judge was of opinion, that the indorsement on the writ was not sufficient to connect the defendant as Sheriff, with *Bloxham*, and nonsuited the plaintiff.

In *Easter Term*, 1817, a rule *nisi* having been obtained by Mr. Serjt. *Vaughan*, that this nonsuit might be set aside, and a new trial granted; and on cause being afterwards shewn, by Mr. Serjt. *Best*,

The Court held—That it ought to have been left to the Jury to say, whether *Bloxham* acted under the authority of the defendant; that as the writ was indorsed, "Warrant to *Bloxham*," such indorsement was



RICHARDSON said, that where a Sheriff returns a writ with the name of the officer indorsed on it, it is sufficient to connect him with such officer, as it is always usual for the undersheriff to require the plaintiff's attorney when he applies for a warrant, to indorse upon the writ the name of the officer to whom it is to be directed.

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The learned Serjeant, therefore, took nothing by his motion.

*prima facie* evidence that he was the officer; and that there was no doubt in fact, but that he was appointed by the Sheriff to act for him as such.

Rule absolute for setting aside the nonsuit \*.

Lord Chief Justice GIBBS stated, that he had held at *Nisi Prius*, that an indorsement of this description, was evidence of the warrant having been directed to the particular officer named in the writ; and that in another instance, he had allowed it to be sufficient evidence for that purpose, where the undersheriff had proved that he had inserted the name of the officer, or that it was done at the Sheriff's office.

\* See *Fonsick v. Magnay*, 1 Marsh. 554. S. C. 6 Taunt. 231.

Sir CHARLES CHAD, Bart. v. TILSED the elder.

Thursday,  
February 1.

THIS was an action of trespass. The declaration stated, that the defendant broke and entered two closes of the plaintiff, covered with water, called *Brownsea* and *St. Andrew's Bay*, in the county of *Dorset*, and with boats, nets, hooks and lines, fished in the said closes, and the fish there found

A grant of wreck, from Henry 2. to the Abbey of C. by all their lands upon the sea, confirmed by *inspeximus* by Henry 8. and a subsequent grant by him of the island of B. and its shores, belonging to the late Abbey of C. supported by evidence, that between forty and fifty years ago, the proprietor of the island of B. raised an embankment across a small bay, and had ever since asserted an exclusive right to the soil, without opposition:—Held, that although the usage of forty years duration, could not of itself establish such exclusive right, or destroy the rights of the public, yet, that it was evidence from which prior usage to the same effect, might be presumed, and which, coupled with the general words contained in those grants, served to establish such right.

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caught and carried away, and converted the same to his own use. Pleas—First, Not Guilty. Secondly, A plea of licence. Thirdly, That the *locus in quo*, from time whereof the memory of man is not to the contrary, was parcel of the port and harbour of *Poole*, in, over, and upon which, the tides and waters of the sea had immemorially flowed and re-flowed, and that every subject of the realm had and ought to have the liberty and privilege of fishing there. Fourthly, That the *locus in quo*, was immemorially parcel of an arm of the sea, over, and on which the tides have always flowed, and re-flowed, wherefore the defendant entered therein to fish, at proper and seasonable times, as he lawfully might. The plaintiff added a *similiter* to the first, and traversed the second, third, and fourth pleas in his replication ;—on which issue was joined.

At the trial of the cause, before Mr. Baron *Graham*, at the last Assizes at *Dorchester*, the question was, whether the plaintiff as owner of *Brownsea* island, was entitled to a bay situate at its extremity, called *St. Andrew's Bay*, or whether it was an arm of the sea, where the public in general have a right to fish. The plaintiff purchased the island in question, which lay within the ambit of the harbour of *Poole*, and consisted of about one thousand acres, from the *Sturt* family, in 1786, and in support of his title, a grant of *Henry 2.* in 1154, to the Abbey of *Cerne*, of wreck, by all their lands upon the sea, was produced in evidence, which was confirmed by *inspeximus* by *Henry 8.* in 1509. A grant from *Henry 8.* in the 26th year of his reign, to the Earl of *Oxford*, of the island of *Brownsea*, surrounded with water, and the shores thereof, belonging to the late monastery of *Cerne*, then dissolved, together with wreck of the sea, as fully as the late Abbot enjoyed it, was then given in evidence, as well as a grant from the Earl of *Oxford*, to one *Richard Duke*, of *Brownsea*, reciting a grant to him of that island, and wreck of the sea, as fully as they had been granted to

the said Earl. An inquisition of the 15 *Edward 3.* was also proved, as to what were the boundaries of *Poole* harbour, which extended from a place called *Northaven Ford*, to the middle of the water, between the port of *Poole* and *Brownsea*. It was also proved, that *St. Andrew's Bay*, consisted of from between sixty to seventy acres, and that at low water it was left nearly dry, with the exception of a small lake or stream which ran through the middle of it; that about forty or fifty years ago, *Mr. Sturt* raised an embankment at a considerable expence, with a view to exclude the tide, and cultivate the bay; that he used the sea-weed, mud, and gravel within the bank, and grew turnips on part of the inclosure; and that no opposition was made to the embankment by the inhabitants of *Poole*, who were eye-witnesses to its erection; that the embankment was afterwards forced by a storm, and the sea again entered at high tide, that it still continued to do so, and that at low water, it was a space of uncovered mud, with the exception of the stream which ran through the middle of it. It was also proved, that *Mr. Sturt* always treated the *locus in quo*, as his property, and that persons did not fish within the embankment without his consent; that in one or two instances, he had claimed wrecks which were thrown on the bank, and applied them to his own use, without any resistance having been offered.

For the defendant, two grants were given in evidence, in the 13 & 17 *Car. 2.* the first to the Duke of *Richmond*, for thirty-one years, of waste and boggy ground, bounded with the mouth of the harbour of *Poole*, commonly called *Brownsea island*, and a bay called *St. Andrew's Bay*, bounded almost round about with that island, empowering him to embank and inclose the same, provided he should do so and endeavour to reclaim the mud, and bring it into a state of cultivation, within five years from the date thereof. By the second, the same lands were granted to one *Charles Gifford*,

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for forty-one years, provided he endeavoured to reclaim and bring the lands into cultivation within seven years from the date thereof. It appeared, however, that nothing had ever been done under those grants, nor had either of those provisions been complied with. Evidence was also adduced to shew, that persons had fished in *St. Andrew's Bay*, before the embankment was raised by Mr. *Sturt*, and it was attempted to be proved, that similar rights had been since exercised, in contradiction to Mr. *Sturt's* asserted right of property, which, however, were not satisfactorily established. It was admitted at the trial, that the *locus in quo*, formed no part of the harbour of *Poole*, and that no vessels of burthen had ever lain there.

The learned Baron, having summed up the plaintiff's case, was about to enter upon that of the defendant, when he was stopped by the Jury, who said that it was unnecessary for him to do so, as they had agreed on a verdict for the plaintiff—damages one shilling.

Mr. Serjt. *Lens*, in the last Term, obtained a rule nisi, that this verdict might be set aside, and a new trial granted, as it was inconsistent with the legal effect of the evidence, the whole of which should have been submitted to the consideration of the Jury, on the following grounds:—First, That there was evidence to shew, that the *locus in quo* was an arm of the sea, as it was proved that persons had fished there without leave or interruption. Secondly, That at all events, it must have been so considered, until the embankment was raised by Mr. *Sturt*, as owner of *Brownsea*, and as that was not done till within the last forty or fifty years, it could have no avail, as against a public right. The term "*bay*" shews, that it was an inlet over which the sea flowed and ebbed. Thirdly, That no evidence was given to shew, that the Abbey of *Cerne*, or their successors, were to have the *locus in quo* in severalty, and that a mere grant of wreck did not convey any

right to the soil. The terms of the second grant to the Earl of *Oxford* were, "of the island of *Brownsea*, surrounded with water," and not the water surrounding the island. It excluded the soil over which the water passed at common tides, and was only a grant of the island itself, with a right of wreck, to the extent which the Abbey of *Cerne* had and enjoyed upon their land against the sea. Fourthly, That the grants of *Charles 2.* were wholly inconsistent with the supposed rights of the owner of the island of *Brownsea*, for the *locus in quo* was granted *eo nomine* to different persons, on condition of their doing certain things, and as they did not comply with those conditions, the property reverted, and remained in the Crown as it did before, and there was no evidence to shew, that at the time these latter grants were made, the Crown was not empowered to do so. Even allowing that the embankment had stood from the time it was erected, it could not have the legal effect of appropriation, if it were not private property, and there was no evidence whatever of any grant of the Crown, so as to make it a property of that description. If a right is set up against the Crown, there must have been an uninterrupted enjoyment for at least sixty years; and in *Vooght v. Winch (a)*, it was decided, that no length of time can stop the navigation of a river which was once navigable; for the right of the public must still remain. Here, therefore, the right to the soil in the *locus in quo*, between high and low water-mark, was vested in the Crown, and the public had a right to fish there, it being an arm of the sea, notwithstanding the recent acts of ownership which had been set up.

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Mr. Serjt. *Pell* now shewed cause, and admitted, that if it had been shewn at the trial that the public had at any time a right to the *locus in quo*, no usage in opposition thereto could destroy such right, but, that on the other hand, it must be conceded, that of common right, the shore between

(a) 2 Barn. &amp; Ald. 662.

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high and low water mark belongs to the Crown, who may grant it at their pleasure, and that such grant may be produced in evidence, either by the production of the instrument itself, or usage consistent with it. If the plaintiff had no right, neither had Mr. *Sturt*, and it is extraordinary that the Corporation of *Poole* allowed the embankment to be made between forty and fifty years since, without interruption, and never since interfered in the slightest degree. It has been admitted, that the bay in question forms no part of the harbour of *Poole*, neither can it be an arm of the sea, as it is a part of the island of *Brownsea*, and the shores round it were originally in the Crown, and by them granted to certain of their subjects, and from the grant of wreck and an enjoyment under it, it must be presumed, that it conveyed a right to the soil of the shore. With respect to the grants from *Charles 2.* there was no evidence whatever as to any enjoyment under them. In *Constable's case* (a) it was resolved, that "the soil on which the sea flows and ebbs, that is, between the high and low water mark, may be parcel of the manor of a subject." Here, acts were proved to have been exercised by Mr. *Sturt*, indicative of his rights, as he not only used the sea weed, &c. but asserted his right to the property by continual acts of denial, which appear to have been almost invariably acquiesced in after the embankment was made by him. Although those acts and subsequent acquiescence may not of themselves constitute any right, still, they are evidence from which anterior usage may be presumed, which coupled with the original grants, were quite conclusive as to the plaintiff's right to recover, and more particularly so, as the verdict of the Jury was neither against law, evidence, or the opinion of the learned Judge who tried the cause.

Mr. Serjt. *Lens* in support of the rule.—The question at the trial, depended on the fair result of law to be derived from

(a) 5 Rep. 107 a. See also Bac. Abr. tit. Prerogative, B. 6.

the whole of the evidence which should have been stated to the Jury, together with such directions as the learned Judge should give upon the point of law, and they should have abstained from giving their verdict, until he had arrived at the conclusion. There was no evidence of enjoyment under the grants of wreck put in by the plaintiff; on the contrary, it must be inferred, that these never extended to the soil surrounding the island of *Brownsea*, as they were confined strictly to wreck. The rights subsequently claimed by *Mr. Sturt* were therefore in direct opposition to those grants. The *locus in quo* still remained an arm of the sea, subject to all the uses that could be made of it as such. It formed no part of the island of *Brownsea* nor its shores; even if it did, the right would remain in the public, and the acts set up by *Mr. Sturt*, are founded on usurpation, and though they may have been acquiesced in by modern usage, still, that will not confer a title to the soil, as no length of time is of itself sufficient for that purpose, unless it be established by a prior right. No wreck could be claimed on the spot in question, before the erection of the wall, which was an encroachment, as it tended to alter the former enjoyment. At all events, there was an extension of the island by the erection of the wall—and although the Corporation and inhabitants of *Poole* might have acquiesced in its being raised, still, it will not alter the rights of the public, nor deprive them from fishing, as they had formerly been accustomed to do. In the *Mayor of Orford v. Richardson (a)*, it was decided, that there may be a prescriptive right in a subject to a several fishery in an arm of the sea. Public rights cannot be devested even by an express grant from the Crown, but here, the grants were qualified and restrictive, and confined to wrecks alone, which cannot be deemed to pass the soil in any way whatever. On the contrary, the assumption of such a right by the plaintiff, excludes it altogether, for by the subsequent grants of *Charles 2.* the right to the soil of the

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(a) 4 Term Rep. 439.

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*locus in quo* could not extend to the owner of *Brownsea*, as it was there described as *St. Andrew's Bay*.

Lord Chief Justice DALLAS.—I agree with my Brother *Lens*, that this case must rest on one or both of two grounds, that is to say, either on the documentary evidence which consisted of the grants produced at the trial, or on continued usage, which pre-supposes the existence of a grant. I also agree with him, that when a grant has been produced, no usage, however long, can alter or countervail the terms of such grant, for what is done under usurpation cannot constitute a legal usage. The fundamental rule laid down is, that when an ancient grant contains general words, the best exposition of it is by constant and uninterrupted usage. Unless, therefore, an usage and enjoyment for forty years can be shewn to have originated in usurpation, it is evidence from which usage anterior to that time may be presumed. Here, the modern usage, as connected with the ancient, affords a strong exposition of the meaning of the original grant of *Henry 2*. The general rule is, that if the language of a grant be obscure, or its construction doubtful, general usage may be resorted to, to expound, although not to control or contradict the instrument, and such usage is a strong practical exposition of the meaning of the parties (a). Ancient grants, therefore, are to be construed by evidence of subsequent usage, however general such grants may be, reducing it to a mere question of fact, as to the mode of right which has been generally and usually exercised. I also agree with my Brother *Lens*, that if usage be traced no higher than forty years, and applied to establish an exclusive right over an arm of the sea, such general usage for that period, would not put an end to or destroy the rights of the public to fish there; but, for the last forty years, the evidence adduced at the trial was as strong as it possibly could be, to establish the plaintiff's claim as to the usage since that time, as the

(a) See Phillips on Evidence, 5th edition, vol. i. page 547.



wall was then raised by Mr. *Sturt*, from whom he purchased, and the embankment made in the sight of the corporation and all the inhabitants of the town of *Poole*; and it is stated by the defendant in one of his pleas, that the *locus in quo* is a part of the harbour, in which all the inhabitants have a right to fish, although they had the same interest at the time the wall was erected, as they now have. That was a strong act of ownership by the then proprietor, for in the view of the whole town, he erected a wall of this description, which was done at a considerable expence, and occupied a great length of time in completing. He was not then interrupted, nor has the claim of the plaintiff, as his successor, been questioned, from the time of his purchase, until this action was commenced. It was further proved, that permission had been frequently asked of Mr. *Sturt*, by fishermen, to fish within the bank, and that he either granted or refused them according to his discretion. The usage therefore since the erection of the wall, is as strong as it can possibly be. It has been asked, if the corporation of *Poole* had been in confederacy with Mr. *Sturt*, when the wall was built, and did not choose to interfere with the subsequent usurpation by him and the plaintiff, whether it would deprive the fishermen of that town, of their right to fish over the *locus in quo*? Certainly not. But if it touched the interest of all the inhabitants of *Poole*, and so general a right had before existed, it must be then presumed as a matter of course, that any usurpation of that right would have been resisted. But there is no ground for presuming that any confederacy ever existed between the owner of *Brownsea* island, and the corporation of *Poole*, when the embankment in question was raised. I have before observed, that general words in a grant, are to be explained by subsequent usage. Here, the original grant of *Hen. 2.* conveys "the island of *Brownsea*, and the shores thereof;" now, what are to be deemed the shores? It may be mere matter of evidence; but the grant itself shews, that the shores were to be considered as part of the

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island. These, too, are general words, and what is now to be deemed part of the shores is to be ascertained by continued usage. It appears then, that for the last forty years, there has been an assertion of right by the owner of *Brownsea* island, which has been acquiesced in by all the inhabitants of *Poole*. It has been further said, that the grant extended only to wreck, and conveyed no interest in the soil, but it must not be confined to such wrecks only as float on the water, but those which rest and remain on the soil, after the receding of the tide. Usage alone can determine what has been deemed soil, and here, it was proved, that no part of the *locus in quo* could ever bear navigable vessels, or vessels of burthen of any description. It has been farther observed, that there is a rivulet or lake continually running through the middle of it, but that will not make it less a part of the shore. The legal argument then, that this is not part of the soil, altogether fails, for at low-water mark, the spot in question was left nearly dry. Under these circumstances, I am of opinion, that this case was very properly disposed of by the Jury, and therefore, that there ought not to be a new trial.

Mr. Justice PARK.—It may be unnecessary for me to say more, than that I perfectly concur with my Lord Chief Justice in the opinion he has just given, and more particularly so, as it does not infringe on any rule of law. It is true, that the Crown may have a property in an arm of the sea, but it may also vest in a subject by grant or usage. The grants of *Hen. 2. & 8.* contained no inconsistency whatever with the usage as established, or the evidence adduced at the trial; on the contrary, they contained general words, which were most fully explained by subsequent usage, and for the last forty years, it was one constant and uninterrupted usage. It is therefore reasonable to suppose, that the ancient usage was conformable to the modern. Although the grants of *Charles 2.* might be evidence for the defendant, still, they

were not near so strong as the testimony of several of the old fishermen of *Poole*, who were examined at the trial, as to the right exercised by Mr. *Sturt* since the erection of the wall. There was no contrariety whatever as to the constant usage. The ground on which the Court decided in *Vooght v. Winch*, was, that twenty years possession was not conclusive evidence of a right of water, or that an usage for such time, extended to a public navigable river. Here, however, the usage confirms the former grants of *Henry 2.* and *8.* and it appears to me, that the grants of *13.* and *17. Charles 2.* were not repugnant or contrary to them, as the latter were never acted on nor acquiesced in by the owner of *Brownsea* island. I therefore am also of opinion, that the Jury have formed a right conclusion.

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Mr. Justice BURROUGH.—I am entirely of the same opinion. The ground on which this motion was made, was, that the verdict is against the legal effect of the evidence given at the trial. But the evidence adduced by the plaintiff, as to the usage, tends to confirm and ratify the grants of *Hen. 2. & 8.* the first of which contained a grant of wreck to the Abbey of *Cerne*, throughout all their lands upon the sea. It has been said, however, that these lands do not extend beyond the main land of the island of *Brownsea*, still, it must extend to the *locus in quo*, for it appears, that it was only covered at high water, and was left quite dry at the receding of the tide. There was also evidence, that wrecks had been left there, and claimed by the owner of *Brownsea* island. It is a strong fact, to shew that the Crown intended to grant the land in question, in the first instance, under the words, “of all their lands upon the sea.” The grants of *Charles 2.* produced by the defendant, unless accompanied by possession, would avail him nothing, for Lord *Kenyon* frequently held, that deeds produced

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by a party, could not be used in evidence, unless the possession had gone consistently with them. Here, it appears, that no profit was made of those grants by either of the grantees. The Duke of *Richmond* did nothing under the first, and *Gifford* did not attempt to act under the second made to him, because he thought the prior grants were against him, and that persons were in possession under them. Those latter grants, therefore, have no weight whatever for the defendant; but the assertion of right by Mr. *Sturt*, at the time the wall in question was built,—the acquiescence of the inhabitants of *Poole* to its erection,—and the subsequent acts done by him,—are strong beyond all measure in favour of the plaintiff's claim. It was proved, that wrecks had been claimed and used by Mr. *Sturt*, and that he forbade people generally to trespass on the land, but that in some few instances, he allowed fishermen to come there for the purpose of fishing, and this right has been exercised for more than forty years. It might have a very different effect, if this claim had been made when the bank was first put up, but still, it appears to me, that its erection might have been sustained, as it was coupled with these strong words in the original grant, namely, "all their lands upon the sea." The grantee, therefore, had a claim beyond the island of *Brownsea* itself, and I therefore think, that the Jury have decided rightly, and that their verdict ought not to be disturbed.

Mr. Justice RICHARDSON.—I am of the same opinion; and it appears to me that the evidence adduced at the trial warrants the finding, that there was an exclusive right in the plaintiff, and those under whom he claimed; and although it has been said, that this verdict was contrary to the legal effect of such evidence, it appears, that Mr. *Sturt*, as owner of *Brownsea* island, has had an exclusive enjoyment since the wall was built by him; that some persons, on application to him since, had been forbidden to fish on the spot in question, and that others had been allowed that privilege. My Bro-

ther *Lens* has contended, that the plaintiff's case rests on acts of usurpation by Mr. *Sturt* within the last forty years, and that an usage founded on such usurpation can confer no right. If it be clear that the public had a right to fish over the *locus in quo* before that period, and that the raising the bank was an act of usurpation, the plaintiff's right would not be established. But this case, as to the modern enjoyment, must be assimilated to others of a like description. An usage of forty years duration, is not only evidence for that period, but affords a presumption of a similar and anterior usage; if nothing be shewn to the contrary. Here, there was evidence, that before the erection of the wall, the *locus in quo* was between high and low water-mark, that it consisted of waste and oozy ground; and that it was wholly uncovered at low water, with the exception of a small stream which ran through the middle of it. It is quite clear, therefore, that an individual might claim an exclusive right to property of this description, either by ancient grant, or by prescription or usage, independently of such grant. It is laid down by Lord *Hale*, in his Treatise *De Jure Maris* (a), that "the shore which is covered by the ordinary flux of the sea, may not only belong to a subject in gross, which possibly may suppose a grant before the time of memory, but it may be parcel of a manor; and the evidences to prove this fact, are commonly these:—"constant and usual fetching gravel, and sea-weed and sea-sand, between the high water and low water-mark, and licensing others so to do; inclosing and embanking against the sea, and enjoyment of what is so inclosed; enjoyment of wrecks happening upon the sand; presentment and punishment of purprestures there, in the Court of a manor, and such like." All these rights, except the last, appear to have been exercised by Mr. *Sturt*, and were fully proved at the trial. It has been contended, that the grants in the reign of *Charles 2.* are conclusive for the defendant, but

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(a) Part 1. c. 6. page 27.

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they are merely evidence to shew the state of the spot in question at that time ;—that it was considered to be between high and low water-mark, and that it was waste and oozy land; That therefore, shews, that it was then deemed a *littus maris*, or shore of the sea. But these grants appear to me to be rather against the defendant, as nothing whatever was done by either of the grantees under them. Further, they are not only contradictory to the antecedent grants, but against all the parol evidence in the cause, which I think was abundantly sufficient to establish the plaintiff's right. I therefore concur with the Court in thinking that this rule ought to be

Discharged.

Saturday,
Feb. 3.

DARBISHIRE v. BUTLER.

To debt on bond, the defendant cravedoyer, and after reciting a mortgage-deed which shewed the condition to be for payment of a sum of money on a day specified, according to the tenor of the proviso contained in the indenture,

THIS was an action of debt on bond. The defendant in his plea, cravedoyer, and after reciting a mortgage-deed, shewed the condition to be for the payment of a certain sum of money, on a day specified, according to the tenor of the proviso or condition contained in the indenture, and also for the performance of the covenants of such indenture. The defendant then averred, that there was not any negative or disjunctive covenant in the indenture, and that he paid to the plaintiff the sum mentioned in the condition, on the day and for the performance of the covenants therein; pleaded, that there were no negative or disjunctive covenants in the indenture, and that he paid the money mentioned in the condition on the day therein specified, according to the effect thereof, and performed all the covenants and provisoes in the indenture on his part to be performed. The defendant, in his replication, took issue generally on the non-payment of the money, and concluded to the country. On special demurrer, assigning for causes, that it should have concluded with a verification, and that no breach of the condition was assigned according to the statute 8 & 9 Will. 3. c. 11. s. 8. :—Held, that such replication was good, as the only point in issue was the payment of the money, and as the plaintiff had therein denied the whole substance of the defendant's plea.

therein specified, according to the form and effect of the condition, and that he hath always, since the making of the bond, performed all the covenants and provisoes in the indenture on his part to be observed, fulfilled, performed and kept, according to the true intent and meaning thereof. The plaintiff, in his replication, averred, that the defendant did not pay to him the sum mentioned in the condition, in manner and form as the latter had in his plea alleged, and concluded to the country. To this, the defendant demurred specially, and assigned for causes, that the replication concluded to the country, whereas, it should have concluded with an averment; that no breach of the condition of the bond was assigned according to the statute, and that it was not alleged that the breach of the condition was assigned according thereto. The plaintiff joined in demurrer.

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The cause now came on for argument, when Mr. Serjt. *Taddy*, in support of the demurrer, submitted, *first*, that the replication ought to have concluded to the country; and he relied on the case of *Hedges v. Sandon (a)*, where it was decided, that if a plaintiff in his replication selects one out of several facts in the defendant's plea, he may traverse that one, and conclude with a verification; and Mr. Justice *Buller* there drew the distinction, and observed (*b*), that "if the replication put the whole substance of the defendant's plea in issue, he may conclude to the country." *Secondly*, The plaintiff should have shewn, that there was a breach of the condition existing at the time the action was brought; for although the money might not have been paid on the precise day therein specified, it might have been since, and before the commencement of this suit, and the issue was only taken, whether it was paid on that particular day or not. Although in *Tombs v. Painter (c)*, it was held, that in an action of debt on bond, conditioned not to assault, molest,

(a) 3 Term Rep. 439. — (b) Id. 443. — (c) 13 East, 1.

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or injure the person of the plaintiff, the replication alleging that the defendant assaulted, &c. by beating and ill-treating the plaintiff, was a sufficient assignment of a breach of the condition, for which the Jury were to assess damages on the statute 8 & 9 *Will. 3. c. 11. s. 8.*, although such breach were not alleged in formal terms according to the statute; yet, in an action of debt on bond for the non-payment of money, the plaintiff must shew what sum is in arrear at the time of its commencement, and that it still remains unpaid.

Mr. Serjt. *Laves*, contra, was stopped by the Court, who said, that there was only one point in issue, namely, whether the money had been paid or not? The bond was conditioned for the payment of a sum on a certain day ensuing the date thereof, according to the tenor of a proviso contained in the indenture of mortgage, and if the defendant did not pay it on that day, the bond was forfeited, and the plaintiff's cause of action was complete. The rule laid down in *Hedges v. Sandon*, does not apply to this case. The plaintiff, in his replication, has denied the whole substance of the defendant's plea. There was therefore no occasion for assigning a breach specially, as issue had been properly taken on the precise averment of payment in the plea.

Judgment for the plaintiff.

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UPTON v. CURTIS and Another.

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THIS was an action of replevin, for taking the plaintiff's goods and timber, in a dwelling-house and close, on the 14th *June*, 1819. *Avowry*—That one *Thomas Pettman*, for two years, next before and ending on the 6th *April*, 1819, and from thence until and at the said time when &c. held the said places in which &c. and during all that time, was tenant

To a declaration of replevin, for taking the plaintiff's goods, the defendants avowed, that one *T. P.*, for two years next before and ending on the 6th *April*,

1819, and from thence until, &c. was tenant to them, by virtue of a demise to him made, at the yearly rent of 298*l.*, payable half-yearly, and that one year's rent being due from him to them, on the day aforesaid, they well avowed the taking, &c.—*Plea in bar*, that one *W. P.*, before the making the demise in the avowry mentioned, and before the defendants had any thing in the premises, to wit, on the 6th *April*, 1815, was seised thereof, in fee, and being so seised, demised the same to the plaintiff, to hold to him for one year, and so from year to year, so long as they should respectively please, at the yearly rent of 20*l.* That *W. P.* being so seised, the plaintiff entered under the demise made to him, and so remained until the said time when &c. That *W. P.*, being entitled to the reversion, on the determination of the demise to the plaintiff, on the 1st *December*, 1815, demised the premises to *T. P.* for fourteen years, at the yearly rent of 298*l.* payable half-yearly. That after the making that demise, and during the continuance of the plaintiff's, *W. P.* conveyed the premises to the defendants in fee, and that they had nothing therein at the time of making the distress, except by virtue of that conveyance, and subject to the previous demise to the plaintiff. That *T. P.* did not enter under the demise to him, but that the plaintiff was in possession by virtue of that made to him, and held the same of defendants, as assignees of *W. P.*, and paid them the yearly rent of 20*l.*, so reserved under that demise, which was still subsisting and undetermined. That none of that rent was in arrear from the plaintiff, but that all arrears thereof were paid at the time of the distress, and that the defendants took the plaintiff's goods of their own wrong:—Without this, that *T. P.*, during the whole or any part of the time in which the rent in the avowry was alleged to be in arrear, held as tenant to the plaintiff, otherwise than as in the plea was alleged.—*Replication*, that *T. P.*, during the whole of the time in which the rent in the avowry was alleged to be in arrear, held as tenant to the defendants, as they had in their avowry alleged.—*Special demurrer* thereto, assigning for causes, that the defendants had not traversed the making of the demise by *W. P.* to the plaintiff, or the continuance thereof, or that the plaintiff, when the arrears of rent for which the distress was made, held the premises by virtue of that demise:—That it was not alleged, that such demise had ceased, nor was it shewn that any of the rent reserved under it remained unpaid, and that the defendants had not taken issue on the traverse offered by the plea in bar, nor sufficiently denied, confessed, or avoided the matters therein alleged; that no proper issue was taken by the replication; and that it attempted to put in issue a fact immaterial, and not issuable with relation to the matters in the said plea.—The Court over-ruled the demurrer, as the replication put the material point in issue between the parties, viz. whether *T. P.* held under the defendants, as stated by them in their avowry, and as the facts alleged in the plea in bar, previous to the traverse, were matter of inducement only.

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thereof to the defendants, by virtue of a certain demise thereof to him, *Pettman*, theretofore made, at the yearly rent of 298*l.* payable half-yearly, on the 6th *April*, and 11th *October*, in each year; and that because one year's rent was due and in arrear from *Pettman* to the defendants on the 6th *April*, 1819, they well avowed the taking, &c. as in the declaration mentioned. They also made cognizance as bailiffs of *Pettman*, and averred, that the plaintiff, for two years, ending on the 11th *October*, 1818, held the said places in which &c. as tenant thereof to *Pettman*, by virtue of a demise made to the plaintiff, at the yearly rent of 30*l.*, payable on the 25th *March*, and 29th *September* in each year; and that because the sum of 20*l.*, parcel of 60*l.* of the rent aforesaid, for the said space of two years, ending on the said 11th *October*, became due from the plaintiff to *Pettman*, the residue of the said sum of 60*l.* of the rent aforesaid having been before then paid and satisfied, the defendants well acknowledged the taking, &c. Pleas in bar to the avowry—*First*, That *Thomas Pettman* did not hold as tenant thereof to the defendants. *Secondly*, That one *William Pettman*, before the said time when &c. and also before the making of the demise in the avowry mentioned, and before the defendants had any thing in the said places, in which &c. to wit, on the 6th *April*, 1815, was seised in his demesne as of fee, of and in the said places, in which &c. in the avowry mentioned; and being so seised thereof, he the said *William Pettman* afterwards, and whilst he was so seised, and before the said time when &c. and before the making of the demise in the avowry mentioned, and also before the defendants had any thing in the said places, in which &c. to wit, on the same day and year last aforesaid, demised the said places, in which &c. to the plaintiff, to hold the same to him for one year from thence next ensuing, and so from year to year, so long as it should please the said *William Pettman*, and the plaintiff, or their respective assigns, at and under the yearly rent of 20*l.* payable half-yearly. The plaintiff then averred,

that *William Pettman*, being so seised as aforesaid, and the said demise having been so made to the plaintiff as aforesaid, he afterwards, and before the said time when &c. and before the making of the demise in the avowry mentioned, and also before the said defendants had any thing in the said places, in which &c. entered into them, and became and was possessed thereof, under and by virtue of the demise so to him thereof made, and so remained from thence continually, until and at the said time, when &c. He then averred, that the said *William Pettman*, being entitled to the reversion of and in the said places, in which &c. next and immediately expectant on the determination of the said demise to the plaintiff, and he being so possessed thereof, by virtue of the said last-mentioned demise, afterwards, and whilst it was subsisting, and before the defendants had any thing in the premises, to wit, on the 1st *December*, 1815, *William Pettman*, by a certain indenture of lease, made between himself of the one, and the said *Thomas Pettman* of the other part, demised the said places in which &c. to the said *Thomas Pettman*, to hold the same to him, for fourteen years, from the 11th *October* then last past, at the yearly rent of 298*l.* payable half-yearly, that is to say, on the 6th *April*, and 11th *October*, in each year, which last-mentioned demise, was and is the same demise as in the said avowry mentioned, and not another and different demise. The plaintiff then averred, that after the making the last-mentioned demise, and whilst he was in the possession of the said places, in which &c. under and by virtue of the said demise so to him thereof made, and during the continuance thereof, to wit, on the 20th *January*, 1816, by certain valid conveyances in that behalf, duly made by the said *William Pettman*, he demised, granted, bargained, sold, released and confirmed to the defendants, the said places, in which &c. and all the estate, right, title and interest of him *Pettman* therein, to hold the same to the defendants, their heirs and assigns for ever; that the defendants had nothing in the said places in which &c. until the making of the said conveyances, nor

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had they any thing therein at the time of making the distress in the avowry mentioned, except by virtue of the said conveyances, and subject to the demise so previously made thereof to the plaintiff as aforesaid, and which said demise at the said time when &c. remained and was subsisting and undetermined; that the said *Thomas Pettman* did not at any time after the making of the demise hereinbefore mentioned to have been made to him as aforesaid, enter into or take possession of the said places in which, &c. under or by virtue of the said last-mentioned demise; but the plaintiff at the time of making thereof, and from thence until and at the said time when, &c. was in the possession of the said places, in which &c. under and by virtue of the demise so to him thereof made as aforesaid, and for and during all the time last aforesaid, held the same of the defendants, as such assignees as aforesaid, of the said *William Pettman*, under and by virtue of the demise so to him made thereof as aforesaid, and for and during all that time, paid to the defendants the said yearly rent of 20*l.* so reserved and made payable by him as aforesaid, under the demise which is still subsisting and undetermined; that at the said time when &c. nothing of the said yearly rent of 20*l.* remained or was in arrear from the plaintiff, but the said last-mentioned rent, and all arrears thereof, at the time of making the distress, had been and were fully paid and satisfied, and that after the rent had been so paid, and whilst the plaintiff was in the possession of the said places, in which &c. under the demise so to him thereof made as aforesaid, the defendants at the said time when &c. of their own wrong, took the goods and chattels of the plaintiff, in the declaration mentioned, in the said places, in which &c. and unjustly detained the same, against sureties and pledges, until, &c. in manner and form as the plaintiff hath above thereof complained against them;—without this, that the said *Thomas Pettman*, during the whole or any part of the said time, in which the said rent in the said avowry is alleged to be in arrear, accrued or become due, held and enjoyed the said places, in which &c. as

tenant thereof to the said plaintiff, under the said indenture of 1st *December*, 1805, otherwise than as in this plea is in that behalf above alleged; And this, &c. Wherefore, &c.

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There were other pleas in bar, stating the demise in different terms, and that there was no rent in arrear.—Replication to the second plea in bar, that the defendants ought not to be barred from avowing the taking of the said goods and chattels, in the declaration mentioned, in the said places in which &c. and justly, &c. because as before, they said, that the said *Thomas Pettman*, during the whole of the said time in which the said rent in the said avowry alleged to be in arrear, accrued and became due, held and enjoyed the said places, in which &c. as tenant thereof to the defendants, in manner and form as they had in their avowry in that behalf above alleged; and this they prayed might be enquired of by the country. To this replication, the plaintiff demurred specially, and assigned for causes, that the defendants had not thereby traversed or denied the making of the demise in the second plea mentioned, and thereby alleged to have been made by the said *William Pettman* to the plaintiff, or the continuance of that demise, or that the plaintiff at the said time when &c. and during the time in which the said supposed arrears of rent, for which the said distress was made, accrued;—held and enjoyed, or was in the possession of the said places in which, &c. under and by virtue of the said demise so to him thereof made by the said *William Pettman*; that it was not alleged that the said demise so made to the plaintiff, had ceased or was ended or determined, before or at the said time when &c. nor shewn or alleged, that any thing of the said rent reserved and made payable under and by virtue of that demise, remained, or was in arrear or unpaid, at the said time when &c. and that the defendants had not taken or offered an issue on the traverse taken in and by the said plea, nor sufficiently denied, confessed, or avoided the matters therein above alleged; and that no apt or proper

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issue was taken or offered in or by the said replication; and that it attempted to put in issue a fact immaterial, and not issuable, with relation to the matters contained in the said plea in bar; and that the replication was in other respects, uncertain, informal, and insufficient, &c.—The defendants joined in demurrer.

The cause came on for argument this day, when

Mr. Serjt. *Lawes*, for the plaintiff, submitted, that he was entitled to judgment by law, as well as the general rules of pleading. None of the material facts in the second plea, are denied or answered in the replication, nor does it take issue on the traverse therein made;—it is therefore insufficient and defective. That traverse is qualified by a reference to, and must be coupled with the antecedent facts as stated in the plea, viz. the previous demise of *William Pettman* to the plaintiff; and the replication merely states, that *Thomas Pettman* held as tenant to the defendants, as they had alleged in their avowry. The plaintiff was tenant from year to year to *William Pettman*, under a demise from him, previously to that stated in the avowry. The defendants therefore, had no right to distrain in respect of the rent avowed for. The replication should have stated the holding to be otherwise than that alleged in the second plea, and not confined it to the defendants' avowry. The traverse in that plea is thereby avoided, and the facts therein contained, are not denied.

Mr. Serjt. *Lens*, contra.—The issue is properly taken by the defendants in their replication, and they have therefore adopted the right and proper course. If they had traversed all the facts contained in the second plea in bar, the issue would have been far more objectionable. The whole of the facts may be tried on it as it now stands. None of them stated in that plea, were admitted in the replication, but the defendants averred, that *Thomas Pettman*, during the whole of the time in which the rent in the avowry accrued due, held as

tenant thereof to the defendants, in manner as they had in their avowry alleged. The facts, as stated in the plea in bar, are introduced circuitously, for the only question is, whether the holding by *Thomas Pettman*, was in the terms set out in the avowry. The anterior holding is wholly inconsistent with the point in issue between the parties. There is no occasion to notice the former lease from *William Pettman*. If, therefore, the whole of the matters in the second plea had been traversed by the defendants, it would be only a circuitous mode of coming at the same point; and the only question in issue is properly taken in the replication, and is the only subsisting fact to go to a Jury.

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Mr. Serjt. *Lawes*, in reply.—Both the demises refer to the same subject-matter. The plaintiff has denied any tenancy in *Thomas Pettman*, otherwise than was alleged in the plea. That, therefore, had reference to the first lease from *William Pettman*, which was still in existence, and consequently prevented the defendants from their right to distrain. The replication only takes issue on whether *Thomas Pettman* was tenant to the defendants. That depends on circumstances, which are fully set out in the plea in bar, whereby it fully appears, that the defendants had no right to distrain. The facts therein stated, constitute the substance of the issue. The tenancy is admitted as stated in the avowry, but coupled with those other circumstances, it amounts to an avoidance of the defendant's remedy by distress.

Lord Chief Justice DALLAS.—It clearly appears to me, that the pleadings as framed, substantially put in issue the only material question to be tried between the parties. It is, whether *Thomas Pettman* held under the defendants, as stated by them in their avowry. The substance of the plaintiff's second plea in bar is a denial of such holding. The only point then to be considered, is the nature of that holding, and what it actually was. The replication states, that the holding was in the same terms as alleged in the

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avowry. I therefore think there is no ground for the demurrer.

Mr. Justice PARK.—I am of the same opinion. The avowry stated, that *Thomas Pettman* held as tenant to the defendants, at the time of the distress. That is the point in issue between the parties, and all the circumstances, as stated in the plea, merely tend to shew, that he did not hold as such tenant to them.

Mr. Justice BURROUGH.—One of the causes assigned as a ground of demurrer is, that the defendants have not taken or offered an issue in their replication on the traverse taken by the plaintiff's second plea in bar, nor sufficiently denied, confessed, or avoided the matters therein charged. If they had taken issue on the words of the traverse, it would have been immaterial, and therefore the defendants were confined to the terms of the holding, as set out by them in their avowry. It appears to me, that the issue has been most correctly taken, for the facts as stated in the plea, previous to the traverse, merely amount to an inducement, and may be considered as entirely out of the question.

Mr. Justice RICHARDSON.—The only point in this case is, whether the replication raises an issue on the facts as stated in the previous part of the record, under which the rights of the parties, and merits of the case may be tried. I am clearly of opinion that it does. It is stated in the avowry, that *Thomas Pettman* held as tenant to the defendants. The plaintiff by his second plea in bar, has introduced a number of facts by way of inducement, and stated a different holding from that set forth in the avowry, viz. a demise from year to year, from *William Pettman* to the plaintiff, which still continued to subsist, and under which the plaintiff became possessed. My Brother *Lawes* has assumed, that the facts as stated in the plea, are altogether inconsistent with the holding of *Thomas Pettman* as alleged



in the avowry, as it concludes by traversing that he held otherwise than as in that plea was alleged. That traverse, however, admits a tenancy to exist in *Thomas Pettman* to a certain extent. The defendants being aware of the nature of his holding, averred in their replication, that he held as tenant to them, as they had before stated in their avowry, viz. that he enjoyed the premises as tenant to them at the time of the distress. If they had not taken issue on the tenancy, as stated in the avowry, they would not be entitled to go into proof of such holding. If, therefore, they had taken issue on the introductory facts, as stated in the second plea in bar, it would be immaterial; and there can be no doubt but that the merits of the case will be fully got at, by going down to trial on the issue as it now stands.

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Judgment for the avowants.

ATTWOOD and two Others v. RATTENBURY.

Monday,
 Feb. 5.

MR. Serjt. *Lens*, on a former day in this Term, had obtained a rule *nisi*, that the defendant might be discharged on filing common bail, and that the bail-bond which had been given in this cause, might be delivered up to be cancelled; on an affidavit which stated, that the three plaintiffs, Messrs. *Attwood* and *Spooner*, had sued out a writ against the defendant in their own names, and declared against him as the drawer of a bill of exchange in their own right, and that in the affidavit to hold to bail, the debt was stated to be due from the defendant to them, as surviving partners of *Isaac Spooner* deceased.

Where plaintiffs issued a writ against a defendant in their own names, and declared in their own right, and described themselves in the affidavit to hold to bail as surviving partners,—it is a fatal variance;—and the Court ordered the bail-bond to be cancelled, and would not allow the plaintiffs to amend their writ and declaration, on payment of costs.

Mr. Serjt. *Vaughan* now shewed cause, and submitted, that the affidavit formed no part of the process by which the defendant was brought into Court, and that although it

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RATTENBURY. was therein stated, that he was indebted to the plaintiffs as surviving partners, still, they were mere words of description, and might be rejected as surplusage. If a debt be due to a person as surviving partner, and he declares in his own right, the defendant may have his remedy by pleading in abatement, or taking advantage of it at the trial. In *Richards v. Heather* (a), it was held, that under a declaration containing only one set of counts, charging the defendant in his own right, the plaintiff might recover one demand due from the defendant individually, and another due from him as surviving partner. The same principle might apply to the case of a plaintiff. Another objection in this case is, that the defendant has not appeared, but has merely given a bail-bond, and until he had put in bail, he could not be in a condition to make this motion.

But the Court observed, that if the defendant was originally indebted to three persons for money lent, one of whom was since dead, it would be a different loan :—that here it appeared, that there was a variance between the writ and affidavit of debt, which was of itself sufficient to discharge the bail, and it was a necessary consequence that the declaration must follow the writ;—and that under the circumstances, the defendant was entitled to make this motion, as he had been put to the expence of procuring a bail-bond.

Mr. Serjt. *Vaughan* then moved to amend the writ and declaration, by inserting the words “surviving partners of *Isaac Spooner*, deceased,”—which the Court refused, and the rule was accordingly made

Absolute (b).

(a) 1 Barn. & Ald. 29.—(b) See *Spalding v. Mure*, 6 Term Rep. 363.

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CHRISTIE and Others, Assignees of LAING, a Bankrupt,  
v. LEWIS.

Tuesday,  
Feb. 6.

THIS was an action of *assumpsit* for money had and received by the defendant for the use of *Laing*, before he became bankrupt, and also for money had and received by the defendant, to the plaintiffs' use, as assignees of the estate and effects of the said *Laing*, after his bankruptcy. The declaration contained the other usual money counts, with a

The defendant, as owner of a ship, entered into a charter-party with the freighter, by which the former "granted, and to freight let," and the latter "hired, and to freight

took" the ship, for a voyage out and home. The owner covenanted, that the vessel, being well manned and furnished, as is usual for vessels in the merchants' service, the master should receive on board at *London*, goods to be sent alongside her there by the freighter, and deliver them from alongside, at *Newfoundland*, to the agents of the freighter, according to bills of lading, and such cargo having been discharged there, to receive other goods in like manner, and deliver them at *Demerara*; and having discharged the same, should receive other goods there, and deliver them at *London*, agreeably to bills of lading. The owner also agreed, that the ship's boats should assist in unloading and loading the cargoes, when required by the freighter, provided no impediment was thereby to be made in carrying on the exclusive duties of the ship. In consideration whereof, the freighter covenanted to send and take the goods from alongside, and to pay for the freight and hire of the vessel for the voyage, 2600*l.* with *primage*, &c.—one quarter part thereof on delivery of the cargo at *Newfoundland*, by good bills at sixty days sight on *London*, and the remainder by good bills at two months date, from the day of the ship's report inwards at the port of *London*. The voyage was performed, and goods of third persons brought from *Demerara*, under bills of lading, deliverable to the consignees, on payment of certain specified freight therein mentioned, which freight the owner received. Bills of exchange for one quarter's freight were drawn on the freighter at *Newfoundland*, which were afterwards accepted and dishonored by him; and no sum, nor bill for the remaining three quarters freight per charter-party, were given or tendered to him, on the return of the ship:—Held, first, that taking the whole of the charter-party into consideration, the possession of the ship did not pass to the freighter, but remained in the owner, notwithstanding the words of grant used in its commencement, and that the mere circumstance of his having entered into an agreement with the charterer, as to the mode by which he should be paid for freight, did not divest him of his lien on the cargo for freight, and that it made no difference that he had delivered the homeward cargo to the consignees, and received the freight due upon the bills of lading, which was different from that due upon the charter-party. Secondly, that the owner had a lien on the goods of the consignees of the homeward cargo, mentioned in the bills of lading, to the extent of the freight stipulated for therein, as a security for his freight due upon the charter-party.

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count on an account stated, to which the defendant pleaded the General Issue.

At the trial of the cause, before Lord Chief Justice Gibbs, at *Guildhall*, at the Sittings after *Trinity* Term, 1817, a verdict was found for the plaintiffs, damages 198*l.* 16*s.* 9*d.*, subject to a reference as to the amount, and to the opinion of this Court upon the following case:—

The defendant, on the 2d *February* 1815, and from thence continually until the 1st *April* 1816, was the sole owner of the ship *Ann*, belonging to the port of *London*. On the said 2d *February*, 1815, the defendant, as such owner, and *Laing* the bankrupt, entered into a charter-party, under seal, by which the defendant for himself, his heirs, executors and administrators, granted and to freight let, and *Laing*, for himself, his executors, administrators and assigns, hired and to freight took the ship *Ann*, for the voyage, and upon the terms and conditions following, and for the considerations hereinafter mentioned:—*Imprimis*, The defendant covenanted, that the vessel being tight, staunch, and substantial, well manned, tackled, apparelled, and furnished as is usual for vessels in the merchants' service, and for the voyage thereinafter mentioned, the master *William Wilson*, or some other proper person in his stead, should take, receive, and properly stow on board the said vessel, all such lawful goods, wares, and merchandizes, as the said freighter or his assigns might think proper to send alongside her in the port of *London*, not exceeding in the whole, what she could safely stow and carry, over and above her stores, tackle, apparel, and provisions; and, having received the same on board, and being dispatched, the said master should immediately (wind and weather permitting), set sail, in and with the vessel, from the port of *London*, and proceed to *Portsmouth*, there to join and sail with the first convoy appointed for *Newfound-*

land, and having arrived at *St. John's*, in that island, should make a right and true delivery of the cargo from alongside, to the agents or assigns of the said freighter, according to bills of lading signed in *London*; and such cargo being discharged, and the vessel rendered tight, staunch, and substantial, well manned, and furnished in the manner aforesaid, the master should take, receive, and properly stow on board the said vessel, from the agents or assigns of the said freighter, all such lawful goods as he or they might send alongside, in craft, (provided at the costs and expences of the said freighter, his agents or assigns), not exceeding in the whole, what she could safely stow and carry, over and above her stores, tackle, apparel, and provisions; and having so completed her loading in *St. John's* aforesaid, and being dispatched, should immediately (wind and weather permitting), set sail, and proceed from thence, with or without convoy, to *Demerara*; and having arrived there, should make a right and true delivery of the cargo from alongside, to the agents or assigns of the said freighter, the conveyance thereof from the ship to the shore, to be at his or their expence; and having discharged the same, according to bills of lading signed at *Newfoundland*, and the vessel being in readiness, after the manner aforesaid, for the further continuation of the voyage, the master should take, receive, and properly stow on board the said vessel, all such legal goods as the agents or assigns of the said freighter should send alongside of her, not exceeding as aforesaid; the conveyance of such goods from the shore to the ship, to be at the expence of him the said freighter, his agents or assigns; and being so loaded and dispatched, should immediately (wind and weather permitting), set sail, and proceed from *Demerara*, for the port of *London*, and on her arrival in the *West India Dock* there, make a right and true delivery of such her homeward cargo, agreeable to bills of lading, and then end and complete the said intended voyage, "the act of God, the King's enemies, fire, the dangers and accidents of the seas, rivers, and navigation, of

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whatsoever nature and kind, always and in all cases excepted."—And the said owner consented and agreed, that due assistance should be given with the ship's boats, properly manned for the purpose, in unloading and loading the cargoes, at the respective ports above mentioned, at all times, when required by the freighter, his agents or assigns; but it was nevertheless understood, that no impediment was thereby to be made, in carrying on the exclusive operations or duties of the ship; and the said owner did further covenant, promise, and agree with the said freighter, that he should be allowed in the whole, one hundred running days, for loading the said vessel in the river *Thames*, for unloading and loading her in *St. John's*, and for unloading and loading her in *Demerara*; such lay-days to commence from the day the ship should be entered outwards at the Custom-House in the port of *London*, and ready to receive the cargo on board, due notice thereof being given to the said freighter, his agents or assigns, to discontinue on the day she should be cleared out and dispatched from the port of *London*; to re-commence at *St. John's* from the day she should be entered and ready to unload, and to continue until she should be cleared out and dispatched from thence for *Demerara*; to re-commence from the day she should arrive and be entered inwards at the port of *Demerara*, and ready to unload, and to continue until she should be loaded and cleared out for the port of *London*: Provided always, and it was expressly understood and agreed, that the vessel should not be delayed at *St. John's*, *Newfoundland*, for the purpose of loading and unloading, more than twenty-five running days in the whole; to commence from the day of the ship's reporting inwards, and being ready to deliver, leaving the residue of the hundred running days allowed as above, for the purpose of unloading and loading the said vessel at *Demerara*; but it was fully understood and agreed on by the said parties, that the vessel should be loaded at *Demerara*, and dispatched in time for her to sail, and depart from thence for the port of *London*, on

or before the 1st *August*, then next ensuing.—In consideration whereof, the said *Laing*, did thereby for himself, his heirs, executors, and administrators, covenant with the defendant, his executors, administrators, and assigns, that he the said freighter, his agents or assigns, should send, or cause the several cargoes above referred to, to be sent alongside the said vessel, and also take from alongside her, at the respective ports of loading and unloading above mentioned, free of expence, in providing craft or other conveyance for that purpose, to the owner of the vessel as aforesaid, the boats of the ship properly manned, assisting in such unloading and loading of the said cargoes, at all times when required, but not to the impediment of carrying on the exclusive operations or duties of the ship, conditioned and agreed to on the part of the owner, as above, and that within the time before limited, or days of demurrage thereafter mentioned. And further, that the said freighter, his executors, administrators, or assigns, should well and truly pay or cause to be paid unto the said owner, his heirs, executors, administrators, or assigns, in full, *for freight and hire* of the said vessel for such voyage, the sum of 2600*l.*, together with 5*l.* *per cent.* *primage* thereon, and in addition to the said freight and *primage*, two-thirds of all dock dues, port and pilotage charges incurred during the whole of the voyage; and the said freight, &c. was to be paid in manner following, *viz.* one quarter part thereof, on a right and true delivery of the cargo at *Newfoundland*, by a good bill or bills on *London*, at sixty days' sight, and the remainder thereof, by a good bill or bills, at two months' date from the day of the ship's report inward in the port of *London*:—and the said freighter, for himself, his executors and administrators, covenanted with the said owner, his executors, administrators, and assigns, to make all necessary disbursements and advances, both at *Newfoundland* and at *Demerara*, in and about the concerns of the ship, all which advances were to be deducted from the last payment of the freight, provided

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that it should be lawful for the said freighter, his agents or assigns, to detain the ship, on demurrage, at the ports of loading and unloading aforesaid, any or either of them, any time or term not exceeding twenty days, on paying to the owner of the vessel, or his order, 10*l.* demurrage money per day, day by day, as the same should become due.—And for the true and due performance of all and singular the covenants, clauses, provisoes, and agreements therein contained, the said parties respectively thereby bound and obliged himself and themselves, his and their several and respective heirs, executors and administrators: the defendant especially bound his vessel, her freight and appurtenances, and the said *Laing*, the cargoes to be laded on board her, unto the others and other of them, and to the executors and administrators of the others and other of them, mutually and reciprocally, in the penal sum of 5000*l.*

After the execution of the charter-party, a cargo of goods were shipped by *Laing*, and divers other merchants, in pursuance of arrangements made between them and him, on board the vessel in the river *Thames*; and *William Wilson*, the master, at the request of *Laing*, signed bills of lading for the goods, deliverable to the respective consignees thereof, at the port of *St. John's*, in the island of *Newfoundland*, according to the form of the bill of lading next hereinafter set forth. The freight of such of the goods as were not shipped by *Laing*, was paid by the shippers to him in *London*, at the time the bills of lading were signed. The goods shipped by *Laing*, were consigned by him to Messrs. *Hart and Robinson*, of *Newfoundland*, for sale, on his account.

“ Shipped, by the grace of God, in good order and well-conditioned, by *George* and *James Brown*, in and upon the good ship called the *Ann*, whereof is master for this present voyage, *William Wilson*, and now riding at anchor in the river *Thames*, and bound to *St. John's*, *Newfoundland*, to say, ten barrels pitch, ten barrels tar, and eighteen chests



tea, five bales hops, and two bales raven ducks, being marked and numbered as in the margin, and are to be delivered in the like good order and well-conditioned, at the aforesaid port of *St. John's, Newfoundland*; the act of God, the King's enemies, fire, and all and every other dangers and accidents of the seas, rivers, and navigation of whatever nature and kind soever, excepted, unto Messrs. *Hutton, M'Lea and Co.* or to their assigns, freight for the said goods being paid in *London*, with primage and average accustomed. In witness whereof, the said master or purser of the said ship, hath affirmed to three bills of lading, all of this tenor and date, the one of which three bills being accomplished, the other two to stand void. Dated in *London*, 7th *March*, 1815. Quality and contents unknown to

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"*William Wilson.*"

The *Ann* sailed from the river *Thames* on the 16th *March*, 1815, on the voyage mentioned in the charter-party, arrived at *St. John's* on the 12th *May*, 1815, and delivered her cargo, pursuant to the said bills of lading, signed by the master.

*James Laing* sailed in the vessel to *St. John's*, as supercargo of his brother the bankrupt, and acted as such for the voyage.

After the delivery of the cargo at *St. John's* as aforesaid, the master applied to *James Laing* for a bill or bills of exchange for 650*l.*, as for one quarter of the freight, agreeably to the stipulations contained in the said charter-party; and *James Laing* accordingly drew two bills of exchange, for 350*l.* and 300*l.* upon his brother the bankrupt, payable sixty days after sight, to the order of the defendant, and delivered them to the master. These bills were remitted by the master to the defendant, and were duly accepted by *Laing* the bankrupt. They fell due on the 26th *August*, 1815, and were dishonored by him, and have not since been paid.

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After the discharge of the cargo, Messrs. *Hart and Robinson*, of *St. John's*, by the order and on account of *Laing*, the bankrupt, purchased and shipped a cargo of cod-fish on board the *Ann*, for *Demerara*, and the master signed a bill of lading for the delivery of the said cargo of fish, to the said *James Laing*, at *Demerara*. The vessel, on the 6th *June*, 1815, proceeded from *St. John's*, with the said *James Laing* on board, on her voyage to *Demerara*, where she arrived on the 3d *August* following. After the vessel had discharged her cargo at *Demerara*, the said *James Laing* engaged Messrs. *M'Garrel and Co.* at that place, to procure a homeward freight, and various goods were, through their assistance, shipped on board the *Ann*, at *Demerara*, by different merchants, and for which goods, the master of the ship signed bills of lading in the following form :—

“ Shipped, in good order and condition, by *John M'Garrel*, in and upon the good ship called the *Ann*, whereof *William Wilson* is master for the present voyage, now lying in *Demerara* river, and bound for *London*, twenty hogsheads of sugar, being marked and numbered as in the margin, and are to be delivered in the like good order and condition, at the aforesaid port of *London* (all and every the dangers and accidents of the seas, rivers, and navigation, of whatever nature and kind soever, excepted), unto Messrs. *Underwood, Hall and Co.*, or to their assigns, he or they paying freight for the said goods, 9s. sterling *per cent.* In witness whereof, the said master or purser of the said ship, hath subscribed to four bills of lading, all of this tenor and date, one of which being accomplished, the rest to stand void. Dated in *Demerara*, 9th *November*, 1815. Quality and contents unknown to

“ *William Wilson.*”

On the 3d *December*, 1815, the vessel set sail from *Demerara*, on her homeward voyage, and having arrived in the port of *London*, was reported at the Custom-House, on the

26th *February*, 1816, and on the same day entered the *West India Dock*, for the purpose of discharging her cargo. *James Laing* remained at *Demerara*, and afterwards came home by the packet.

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On the 23d *February*, 1816, a commission of bankrupt was issued against his brother, under which he was found and declared a bankrupt, upon acts of bankruptcy committed by him, on the 12th, 13th and 14th *February*, in that year, and the plaintiffs were chosen assignees of his estate and effects, and an assignment thereof was made to them, by the major part of the commissioners named and authorized in and by the said commission, by indenture bearing date the 19th *March*, 1816.

On the day of the report of the *Ann* at the Custom-House in *London*, a copy of the manifest of her cargo brought from *Demerara*, with a notice, of which the following is a copy, written at the foot thereof, was delivered to the Directors of the *West India Dock Company*, by the master, by the direction of the defendant or his agent:—

" To the Directors of the *West India Dock Company*.

" Gentlemen,

" I request you will not deliver any of the above-mentioned goods, without the order of Messrs. *Harrison and Betts*.

" And remain, Gentlemen, your's, &c.

" *William Wilson*."

No sum or sums of money, nor any bill or bills of exchange, were ever demanded by the defendant, or tendered or offered by the bankrupt, or by the plaintiffs, or any other person, to the defendant, for or on account of the sum of 2600*l*. in the said charter-party mentioned, or of any part thereof, either upon the report of the *Ann* inwards, or at any time before or since.

William Wilson, and the crew of the *Ann*, were, upon the voyage mentioned in the said charter-party, and agree-

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ably to the terms thereof, hired and employed to navigate the vessel, and she was during the voyage navigated, with the exception of the port and pilotage charges, and dock dues mentioned in the charter-party, at the defendant's expence.

The goods brought by the *Ann* from *Demerara*, were delivered out of her into the *West India Dock*, on the 14th *March*, 1816. The defendant employed Messrs. *Harrison* and *Betts*, ship brokers of the city of *London*, to report the ship, and collect the freight of the goods brought by her from *Demerara*, from the respective consignees thereof, for his use and on his account, and under such employment, Messrs. *Harrison* and *Betts* received from the consignees of the said goods, the freight payable by them respectively, and afterwards paid over to the defendant, the balance of the money so received, after deducting the dock and other charges.

The question for the opinion of the Court was, whether the plaintiffs were entitled to recover the money so received for freight, and so paid over to the defendant by Messrs. *Harrison* and *Betts*, as above mentioned. If they were, the verdict was to stand—if not, it was to be set aside, and a nonsuit entered, unless the Court should think fit, upon the application either of the plaintiffs or of the defendant, to turn this case into a special verdict.

The case was argued three times. First, in *Trinity Term*, 1819, by Mr. Serjt. *Bosanquet*, for the plaintiffs, and Mr. Serjt. *Copley*, for the defendant; secondly, in *Michaelmas Term*, 1819, by Mr. Serjt. *Vaughan*, for the plaintiffs, and Mr. Serjt. *Lens*, for the defendants; and lastly, on this day, by Mr. Serjt. *Taddy*, for the plaintiffs, and Mr. Serjt. *Hullock*, for the defendant.

For the plaintiffs it was submitted, that the doctrine laid down in the case of *Hutton v. Bragg* (a), was precisely in

(a) 2 Marsh. 339. S. C. 7 Taunt. 14.

point, and which had never since been controlled or impugned. Even if it had, it would be distinguishable from the present, on the ground, that this is an action to recover money improperly received by the defendant, through the medium of ship brokers, from the consignees of goods, for freight which was in point of fact due to *Laing*, the bankrupt, to whom the ship was chartered, and there the action was trover, for the actual detention of the goods. Although the defendant might have had a lien on the goods which were brought from *Demerara*, he cannot be entitled to retain the money received by him for their freight, as there was no contract or privity between him and the consignees, who engaged to pay such freight under bills of lading. The important distinction was adverted to by Lord Chief Justice *Gibbs*, in *Hutton v. Bragg*, as to whether the goods were put on board the vessel by the owner or by the charterer; and although it does not appear in the report of that case, that the charter-party contained the words, "let to freight (a)," still, the decision proceeded on the ground, that the owner had parted with possession of the vessel, and that the charterer had become owner for the voyage. So, here, the defendant, as owner, let the vessel to freight to *Laing*, who hired her for the voyage, on certain conditions as expressed in the charter-party, and it is therefore clear, that the entire possession passed to him as such charterer. The defendant was to be paid for the freight of his vessel by *Laing*, under the charter-party, and not by the shippers or consignees for the freight of the homeward cargo. He was further by the terms of the charter-party, to be paid for the freight and hire of the vessel, by bills of exchange on *London*, and not immediately on her

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(a) The terms of the charter-party in *Hutton v. Bragg*, were, that "the owner had granted and letten the vessel to freight to the merchant, who had accordingly hired and taken the same;" and as the instrument was not set out in the special case, its precise terms were omitted in the report.

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arrival there. It must be admitted as a clear proposition, that a carrier, either by land or by water, is entitled to detain goods until their carriage be paid; but it does not depend as to the mode of conveyance, for if goods be delivered by the owner to a carrier, it matters not to whom the waggon or ship in which they are to be carried belongs; but the only question is, who is in fact the carrier? Here, the defendant seeks to detain for the carriage of the goods of third persons, which were put on board the vessel at *Demerara*, by the owners thereof, who contracted with *Laing* to pay him freight for the same. He there acted ostensibly as the carrier, as he put up the ship for goods as a general ship. The shippers could not know what agreement existed between him and the owner of the vessel, and they were not bound to enquire whether he were the charterer or not. This case is distinguishable from that of *Tate v. Meek* (a), where it was stipulated by the bill of lading, that the goods were to be delivered to the freighters, or their assigns, he or they paying freight for the same *as per charter-party*; and the ground on which the decision in that case turned was, that the delivery of the goods, and the payment of freight, were concomitant acts.

That case, therefore, is wholly beside that of *Hutton v. Bragg*, because there, there was no covenant for the delivery of the goods. Again, in *Tate v. Meek*, there were no words of demise in the charter-party. Although in *Yates v. Railton* (b), the charter-party contained words of demise, the owner merely covenanted to take a cargo on board, and deliver the same to the charterers, and the cargo was consigned to them by bills of lading, they paying freight for the same *as per charter-party*, and it was held, that the delivery of the cargo, and payment of freight were, by the terms of the charter-party, concomitant acts, and that the one could not be required without the other. In

(a) Ante, vol. ii. 278. S. C. 8 Taunt. 280. — (b) Ante, vol. ii. 294.

Yates v. Mennell (a) the charter-party was in the same terms as that in *Tate v. Meek*, and did not contain any words by which the ship was granted or letten to freight, but was a mere contract of mutual covenants. In *Moorsom v. Kymer* (b), it was decided, that where there is an express contract by charter-party, the charterer is entitled to the freight of goods, and not the owner, on the ground, that a consignee can only become liable either by an express or implied contract, and that the law would not raise an implied promise in a third party, where there is an express agreement, and more particularly, a deed under seal between the original contractors. So, in *Cock v. Taylor* (c), it was held, that where no express agreement has been made by the shipper for freight, the consignee becomes liable for it, by accepting the goods under the bill of lading; as there it did not appear that any charter-party existed, or that the party under whom the defendant claimed, was liable in any way whatever. That, too, was the case of a general ship, where there was no special contract between the parties, but only a bill of lading. Here, the defendant has received money which is not his own, for the freight was due to him from *Laing* the bankrupt, and not from the consignees of the goods, who were indebted to the latter alone, and no one could have sued them for the freight of such goods but him. The defendant, therefore, has obtained a preference over the other creditors of *Laing*, without the permission or authority either of him or his assignees. The case of *Paul v. Birch* (d), is somewhat similar to the present, and Lord *Hardwicke* there said, that "a person that lets out his ship to hire, ought to take care that the hirer is a substantial man, and sufficient to make good the hire, and it is his business to look into this, and if the persons who hire, are not competent, the master must suffer for his neglect. Whatever hardship, therefore, there may be on the one hand, to the person who lets out to hire,

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(a) Ante, vol. ii. 297. — (b) 2 Manl. & Selw. 303. — (c) 13 East, 399. — (d) 2 Atk. 621.

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the hardship is much greater on the other side, and what gives an additional weight to the merchant's case, is the great convenience this gives to trade in general." That case, therefore, established, that where the owner of a ship lets her to hire, the hirer must be considered as the owner, and that where the owner has a claim against such hirer for the freight of the ship, the shippers or consignees of goods are not liable to pay such hire. His Lordship there also observed, that "the sum that was to be paid, was improperly termed the freight of the goods, but that it was rather for the hire of the ship, as the factors had made an agreement with the master on their own account, and not on the part of the merchants, and therefore, that the latter were not liable, otherwise they would be in the hardest case imaginable; for they would be liable to any agreement between the occupiers of the ship, and the original owners of it." If *Laing's* brother had received the freight for the homeward cargo at *Demerara*, as on the outward cargo, the defendant's claim for the hire of his vessel would still remain unsatisfied, but he could not detain the goods constituting such cargo, until the freight were again paid to him as owner, as they were the property of third persons, and his right of lien could only be set up in respect of his own demand for the hire of the vessel under the charter-party. Here, it is quite clear, that the defendant demised the vessel to *Laing* by the charter-party for the voyage. The cases of *Phillips v. Rodie* (a), and *Birley v. Gladstone* (b), have decided, that a lien for freight exists only in respect of freight actually earned, and cannot be extended to a sum claimed for dead freight. The defendant, therefore, could not detain or have a lien on the whole of the goods which constituted the homeward cargo, till his demand against *Laing* had been satisfied—nor could he detain those for which the freight had been paid, because the freight due for those on board on the homeward voyage, remained unpaid. The most important fact in this case is, that the defendant has by the express

(a) 15 East, 547.——(b) 3 Maul. & Selw. 205.

terms of the charter-party, let the vessel to *Laing* for freight, who hired and took her for the voyage, and. covenanted to make all necessary disbursements and advances concerning her, although such advances were to be deducted from the last payment of the freight. In *Vallejo v. Wheeler* (a), it was decided, that where a ship-owner demised the hull of the vessel to the freighter, it constituted him owner *pro tempore*, insomuch so, that a deviation committed by the master with the knowledge of the absolute owner, and which could not, according to the laws of this country, be an act of barratry with respect to him, amounted to such with respect to a third person, who had hired the ship by a charter-party, and who was considered as owner for the particular voyage, with relation to the subject of that cause. The decision in that case was recognized and adopted in *Soares v. Thornton* (b), where Lord Chief Justice Gibbs, in delivering the judgment of the Court, observed (c), that "the principle contained therein was undisputed, and applicable to all cases where the owner of a ship has freighted her to another." It is further observable, that in the last case, the charter-party contained no words of demise or letting to freight—and as the owner had not exercised an absolute control over the ship, but only a power to do certain acts, the Court held, that the owner's right to interfere was completely at an end. So, the case of *The Master of the Trinity House v. Clark* (d), established the proposition, that the charterer of a ship is the owner *pro hac vice*; and although a different doctrine was laid down in the case of *Parish v. Crawford* (e), still, that doctrine is not now to be considered as law, as both Lord Kenyon and Lord Ellenborough have decided differently in the subsequent cases of *James v. Jones* (f), and *Mackenzie v. Rowe* (g). The

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(a) Cowp. 143. S. C. Loft. 632.—(b) Ante, vol. i. 373.—(c) Id. 384.
(d) 4 Maul. & Selw. 288.—(e) 2 Stra. 1251. S. C. more fully reported Abb. on Ship. 4th edit. 22.—(f) 3 Esp. Nl. Pri. Cas. 27. S. C. Abb. on Ship. 23.—(g) 2 Campb. 482. S. C. Abb. on Ship. 24.

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principle of these two latter cases, was adopted by the Court of King's Bench in the subsequent decision of *Frazer v. Marsh* (a).

The judgment of that Court in the late case of *Saville v. Campion* (b), turned on the distinction that there were no express words of demise of the ship itself in the charter-party, as it was merely stipulated, that the owner should receive on board such goods as the freighter thought fit to load, and proceed therewith on a voyage; that all the cabins but one, which was reserved for the use of the captain, should be at the disposal of the freighter, who was to appoint a supercargo to superintend the stowage of the goods; but the captain and crew were employed and paid by the ship owner: and although the case of *Hutton v. Bragg* was there attempted to be impeached, still, it was distinguished by the Court, as the charter-party contained express words of demise as in the present case. The case of *Bohtlingk v. Inglis* (c), referred to by Lord Ellenborough in *Saville v. Campion*, is inapplicable to the present, as it merely decided, that a delivery on board a chartered, any more than a general ship, did not divest the right of the consignor to stop *in transitu*. In the late case of *Crawshay v. Homfray* (d), it was decided, that although a special agreement does not of itself destroy a right to retain, still, that it does so, where it contains some term inconsistent with that right. Here, by the terms of the charter-party, the defendant was to be paid for three-fourths of the freight of the vessel, by bills of exchange at two months date, from the day of the ship's report inwards. He, therefore, could have no lien on the homeward cargo on her arrival, as his claim would not be complete until after the expiration of the two months; that mode of payment was wholly inconsistent with the right of lien, for it was not to take place until after the delivery of the goods, on which the lien arose. He should,

(a) 13 East, 258. S.C. 2 Campb. 517. — (b) 2 Barn. & Ald. 503. — (c) 3 East, 381. See also *Inglis v. Usherwood*, 1 East, 515. — (d) 4 Barn. & Ald. 50.

therefore, either have demanded the bills according to the terms of the charter-party, or refused to deliver the goods which constituted the homeward cargo to the consignees in the first instance, and his having parted with the possession of them, destroyed his right of lien, and consequently he cannot be entitled to recover the sums received for the freight thereof.

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For the defendant, it was contended, that he was entitled to detain the sum received by him for freight, on account of the homeward cargo. By the terms of the charter-party, *Laing*, as the freighter, covenanted to pay to the defendant £600*l.* for the freight and hire of the vessel. Although the word "hire" is introduced, it makes no material difference, as it was the intention of the parties that the ship should be let in the ordinary manner. After she had discharged her cargo at *Demerara*, the defendant's brother, as supercargo, engaged certain persons there, to procure her a homeward freight, and it appears by the bills of lading, that the goods were shipped by them, and not by the supercargo, and the freight was to be paid on the delivery of the goods in *London*, in pursuance of such bills of lading. The freight was accordingly received from the consignees, on account of the defendant, as being due to him for the conveyance of the goods at his expence, in his own vessel, and he has a right to retain it as part of the freight stipulated for by the charter-party, and not as against the consignees under the bills of lading. By the case of *Paul v. Birch* (a), the extent of lien as to goods belonging to third persons, was regulated and confined to the amount of the freight which the goods, when taken on board, were liable to pay; and the result of that case was, that the merchants were liable to pay to the owner, the freight which by their agreement was to be paid by them to the charterer on the delivery of the goods, and the lien of the owner was allowed to that extent. There,

(a) 2 Atk. 621.

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too, it does not appear what the terms of the charter-party were; but here, the defendant seeks to retain the goods constituting the homeward cargo, as against the charterer, and not as against the consignees under the bills of lading, which he was clearly entitled to do, until the terms of the charter-party had been fully complied with and satisfied. If he were to sue *Laing* for the whole of the amount of the freight on the charter-party, the sums received from the consignees for that of the homeward cargo, might be set off by him, as having been paid in part discharge of the freight of the vessel. The cases of *Phillips v. Rodie* (a), and *Birley v. Gladstone* (b), were decided on the ground, that goods might be detained against the consignees for dead freight due from the charterer, and that the owner could have no lien on the goods laden for the freight of unoccupied space, as the claim to retain was for the amount of unascertained damages. So, the cases of *Vallejo v. Wheeler* and *Soares v. Thornton* merely decided, that the freighter, whether under a charter-party or not, was owner *pro hac vice*, as far as respected an act of barratry. But, in the former, the terms of the contract appear to have been inaccurately stated. Both these cases, however, are beside the present question, as the freighter may, by agreement, be empowered to dispatch the vessel where he pleases, although the possession of her may remain in the owner, who may be himself on board; and here, taking the whole of the charter-party together, it cannot be inferred, that the entire possession was transferred by the defendant, to *Laing*, the charterer. The decision of this Court, in the case of *Hutton v. Bragg*, has been since impugned by that of *Saville v. Champion*, although it has been insisted that they might stand together, on account of the distinction drawn by Lord Chief Justice *Abbott*, in delivering the judgment of the Court in the latter, where the charter-party contained provisions similar to the present; and it was there determined, that the absolute possession did not pass

(a) 15 East, 547.——(b) 3 Maul. & Selw. 205.

to the charterer, but remained in the defendant as owner for the voyage. There, too, the freight for the hire of the vessel, was to be paid by bills, and it was held, that there was nothing to shew that the delivery of the goods was to precede the payment by such bills, as provided by the charter-party, so as to deprive the owner of his right of lien. The case of *The Master of the Trinity House v. Clark*, is wholly distinguishable from the present, as it turned on the particular nature of the service in which the vessel was engaged, as she was chartered to the Commissioners of the Transport Service, on behalf of the Crown; and it was held, that a temporary ownership passed to them, and that they should be considered as having possession of the vessel, as it was essential to the success of the undertaking. The case of *Crawshay v. Homfray* was decided on the ground, that the special agreement was inconsistent with the right of lien, the wharfage not being by the usage of trade, payable till a subsequent period, and the goods being to be delivered immediately. That case, therefore, established no new principle, for an agreement by a party to give credit, amounts to a waiver of his lien, but it is wholly immaterial whether a payment be by money or bills, and that distinction was taken by Lord Chief Justice Gibbs in *Hutton v. Bragg* (a). In *Horncastle v. Farran* (b), where the ship-owner having a lien on the goods until the delivery of approved bills for the freight, took a bill of exchange in payment, and though he objected to it at the time, afterwards negotiated it—it was held, that such negotiation amounted to an approval of the bill by him, and was a relinquishment of his lien on the goods. But here, the bills which were accepted by the charterer were dishonored, nor were any demanded or given on the return of the vessel, nor was any payment in fact made; and it was wholly unnecessary to do so, unless the whole of the right of possession of the ship passed to the charterer under

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(a) 2 Marsh. 345. — (b) 3 Barn. & Ald. 497.

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the charter-party. In *Tate v. Meek*; *Yates v. Railston*; *Yates v. Mennell*, and *Saville v. Campion*, the payment of the freight to the owner, for the hire of the vessel, was to be by bills of exchange, and all those cases were decided on the ground, that the delivery of the goods, and payment of freight, were concomitant acts. It has been said, that if the defendant's lien be established, it will be productive of inconvenience to the mercantile world, as no person can be liable to pay more than once for the freight of his goods; and although in *Soldergreen v. Flight* (a), it was held, that the master might detain any part of the merchandize for the freight of all that is consigned to the same person, still, he cannot detain the goods on board the ship, until these payments are made, as the merchant would then have no opportunity to examine their condition; but that does not apply to cases of consignments made to other persons. It has been further said, that on the delivery of the goods, which constituted the homeward cargo, the defendant's right of lien was gone, and that he had no right to retain the freight paid by the persons to whom they were consigned; but if the money be received for the freight *eo instanti* the goods are delivered, it amounts precisely to the same thing. The main question, however, in this case is, whether, on the construction of the charter-party, the absolute possession of the vessel passed to *Laing* the charterer? It is true, that at its commencement it is expressed, that the vessel is "granted and taken to freight." These words, therefore, may, in themselves, be equivalent to a demise, still, however, they may not amount thereto, if a contrary intention appears from the whole of the instrument. The word "freight" can only be applicable to a compensation to be paid for the carriage of goods, and not as a complete letting of the ship itself. In *Soares v. Thornton*, Lord Chief Justice *Gibbs* observed (b), that "that case differed materially from those which had been previously decided, as in them the owner had no right to do

(a) Abb. on Ship. 4th edit. 258. S. C. 2 Holt's Law of Shipping, 98.—

(b) Ante, vol. i. page 384.

any thing on board." In *Bacon's Abridgment* (a), it is laid down as a rule, that "whatever words are sufficient to explain the intent of the parties, that the one shall divest himself of the possession, and the other come into it for such a determinate time, whether they run in the form of a licence, covenant, or agreement, are of themselves sufficient, and in construction of law, will amount to a lease for years as effectually as if the most proper and pertinent words had been made use of for that purpose; and on the contrary, if the most proper and authentic form of words, whereby to describe and pass a present lease for years, are made use of, yet, if upon the whole deed there appears no such intent, but that they are only preparatory, and relative to a future lease to be made, the law will rather do violence to the words, than break through the intent of the parties." In *Doe, d. Jackson v. Ashburner* (b), Lord Kenyon said, that "whether a particular agreement should be considered as a lease, or merely as an agreement for a lease, must depend on the intention of the parties, as it is to be collected from the whole of the agreement." So, in *Poole v. Bentley* (c), Lord Ellenborough observed, that "the rule to be collected from all the cases in questions of that nature was, that the intention of the parties, as declared by the words of the instrument, must govern the construction." So in *Doe, d. Bromfield v. Smith* (d), a similar construction was put upon an instrument which referred to a future lease, and the same rule was adopted in the subsequent case of *Tempest v. Rawling* (e). Even if the legal property in the ship passed by the charter-party, the right of possession did not, and until a lessee or assignee take possession under a lease, he cannot maintain trespass, but as between lessor and lessee, with respect to rent, this reason does not apply, for the right to the rent, and the liability to pay, vest by the lease, and not by the occupation. So, here, the right to the freight,

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(a) Tit. *Lease*, K. 4th edit. vol. iii. 419.——(b) 5 Term Rep. 167.——
(c) 12 East, 170.——(d) 6 East, 530.——(e) 13 East, 12.

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and the liability to pay, vested by the charter-party, and not by the possession of the vessel (a). There may be cases as between an owner of a vessel and a charterer, in which the absolute possession of her might pass to the latter, as if she be let for a term of years, and the charterer should appoint and pay the master and crew, and provide for all the repairs during the time she is hired; but that is not the case in ordinary charter-parties, and more particularly in this case, where, although the words, "let and taken to freight," may be construed to amount to a present demise, still, if the subsequent parts of the instrument be attended to, and construed together, it will appear that the absolute possession of the ship remained in the owner, who stipulated to pay the master and crew, who were appointed before the execution of the instrument, and the vessel was to be navigated by them, and at his expence. So, he also covenanted for the repairs, and nearly all the expences that might be incurred as incidental to the ship; and on her arrival at the respective ports, he further covenanted that the master should deliver the cargo to the freighter, and that due assistance should be given by the ship's boats, in loading and unloading the cargo, when required by the freighter, but that no impediment was thereby to be made in carrying on the exclusive operations or duties of the ship. If, therefore, the exclusive right to the ship had been transferred to the charterer, these stipulations would have been altogether unnecessary, and the master and crew must be taken as the servants of the owner, and not of the charterer, and possession by them must be considered as possession by the owner. If the master had been guilty of misconduct, or negligence, in running down another ship, the remedy would have been against the defendant, as owner, and not against *Laing*, as charterer. So, if an injury had been done to the masts and rigging of the vessel, the owner must have repaired it, for he merely trans-

(a) See *Cook v. Harris*, 1 Ld. Raym. 367, and *Williams v. Bosanquet*, ante, vol. iii. page 529.

ferred the use of the hull to the charterer, for the conveyance of his goods. As well, therefore, on decided cases, as on the intention of the parties, to be collected from the whole of the charter-party, the defendant had a right to retain the sum in question, until the freight had been paid by *Laing*, as charterer, according to the stipulations contained in that instrument; and it makes no difference whether the defendant was sued in trover for the actual detention of the goods, or the sum received by him for their freight, as his right of lien was never divested under the charter-party.

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In reply, it was urged, that whether any goods had been procured by the charterer or not, he was still bound by the charter-party to pay to the defendant the sum of £600*l.* for the freight and hire of the vessel for the voyage. The former alone, therefore, could be entitled to the freight of the homeward cargo under the bills of lading, unless the defendant can be deemed to be entitled to recover twice; and it is a clear rule, that if the amount of freight be regulated by a charter-party under seal, there can be no subsequent parol contract to avoid it; and, as Lord *Hardwicke* justly observed in *Paul v. Birch*, "the sum to be received under the charter-party is improperly termed *freight*, as it was in fact payable for the hire of the vessel." It has been said, that whether the defendant had parted with the actual possession of the vessel for the voyage or not, must depend on the construction of the whole of the charter-party. She was not only "granted and let to freight" for the voyage to the freighter, but taken by him, for himself and his assigns, and that word alone, is sufficient to shew, that the parties intended that the transfer of the vessel should be complete. All the decisions subsequent to *Hutton v. Bragg*, are mainly distinguishable from it, on account of the different terms contained in the respective charter-parties, and the general position has never been impugned, that where a ship is absolutely granted

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and taken to freight, the grantee has in himself such a possession as will constitute him owner *pro hac vice*. There is no contradiction, by the subsequent stipulations contained in the charter-party, to the terms under which the vessel was originally let, as the freighter was empowered, after she had discharged her cargo at *Demerara*, to put her up as a general ship, and take other goods on board on freight. Although the owner might have a right to detain the goods of each individual contracting with him, still, it does not follow that he has such right with respect to those of third persons, for the hire of the vessel due to him from the charterer. The rights of the parties are wholly separate and distinct. So, the consideration in the one instance, is for the freight to be received for the carriage of the goods, and in the other, for the hire of the vessel. The cases of *Poole v. Bentley*, and *Tempest v. Rawling*, are in favour of the plaintiffs, as the terms of the charter-party amounted to an actual and absolute demise of the vessel, although there might be a stipulation for the owner to comply with certain covenants contained therein. The words in a lease are *concessit et demisit*;—so, here, the one “granted” and the other “took and hired the ship to freight.” Those words, therefore, must of themselves infer a legal warranty of title. This case, therefore, must be governed by that of *Hutton v. Bragg*, which, for the reasons already stated, was not impugned by the subsequent decisions of *Tate v. Meek*, *Yates v. Railston*, and *Saville v. Champion*. Here, the master of the vessel must be considered as the servant of the charterer, although the owner was to perform some certain duties in the course of the voyage. On the whole, therefore, it is perfectly clear, that the defendant cannot be entitled to retain the sum for which this action was brought, as there was no privity of contract between him and the consignees, who paid it to the defendant’s brokers, for the freight of the homeward cargo:—and even if he had a lien on their goods, there was a complete waiver of it

on his part, by his having allowed them to be delivered before he claimed the freight due for their conveyance.

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Lord Chief Justice DALLAS.—This case has been so often and so fully before the Court, that it is not now necessary to state the facts in detail, and I shall therefore come to the point at once. The general question depends on these grounds:—The defendant, as owner of the ship *Ann*, contends, that he had a lien on goods on board her, and which constituted her homeward cargo, for freight due to him from the charterer, or on the money received by him for such freight. In order to have a lien, the owner of a vessel must have the possession of her when he asserts such right. Here, it is quite clear, that the defendant had possession as owner when he executed the charter-party, and the main question, therefore, is, whether by that instrument he parted with the possession of the vessel for the particular voyage, so as to make the charterer stand in the situation of owner. It appears necessary for me to say in the outset, that this is not like the common case of a carrier, who has, in point of law, known rights and liabilities. These depend on the particular laws which are applicable to the case of carriers, but a carrier may vary his general liability by a special agreement. So may a ship owner, even if he could be considered as standing in the situation of a common carrier. Here, the charter-party constitutes the specific agreement between the parties, and on the effect of that instrument the question arises. This case appears to me, therefore, to depend on that of *Hutton v. Bragg*, and if that decision be founded in law, it must govern the present. On the best consideration I could give that case at the time it was decided, I concurred in opinion with the late Lord Chief Justice of this Court, and my Brother *Park*. My Brother *Burrough* was absent, and we did not then possess the assistance of my Brother *Richardson* on this Bench. My having concurred in that decision, would be no reason for my

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not giving a different opinion now, if I entertained the least possible doubt that that opinion was improperly formed. I cannot agree with a *dictum* I have met with, namely, that "I must so decide to be consistent with myself." No man is bound, nor has a right to be consistent in error, but before he consents to overturn a judgment in which he concurred, he ought most clearly to see, that the opinion on which that judgment was formed was wrong. Although, therefore, I should now perceive that I had heretofore formed a wrong judgment, I should merely lament it, and not persist in error. It is equally incumbent on those who now disagree with me, to deliver a different judgment, if they see the point in a different view. I will only further say, that a question can scarcely arise in which I can personally have less reason to adhere to my former opinion, than the present. The principal part of the judgment, in the case of *Hutton v. Bragg*, was delivered by the late Chief Justice, and it is wholly unnecessary for me to state, that the opinions he formed had most deservedly great weight with his Brothers on the Bench. As that judgment was maturely formed by him, and as I then acquiesced in it, I think I should not be deemed culpable if I now felt some reluctance to abandon it; and more particularly so, when he cannot re-consider the opinion he then delivered, or support or renounce it, which, from the arguments adduced in this case, he might possibly be induced to do. Still, however, it resolves itself into the consideration of the opinion myself and my learned Brothers may now respectively entertain. I have said thus much, for reasons which will appear in the sequel. First, then, as I consider the case of *Hutton v. Bragg* to be precisely in point, and as I know of no other, either before or after, which contains any doctrine repugnant or contrary to it, nor any which has a direct bearing or analogy to it, either in point of principle or necessity, although I have read in loose and confident assertion, that the decision of that case "caused great astonishment to the profession, and great confusion in the commer-

cial world, and could not be considered as law." It is enough for me to know, that the doctrine there laid down received the sanction of this Court, and that it has never been expressly dissented from by any other.—This case has now been argued here three times, and it was intended that it should have been further argued before all the Judges, if it had been convenient to them to have met for that purpose, and I sincerely lament that it was not. Whether, under those circumstances, I entertain a degree of conviction sufficiently strong to induce me to think that the former judgment was erroneous, is the question which, with reference to myself, I am now bound to consider. Doubts entertained are not sufficient to overturn a decision formally pronounced. Much has been said as to the inconvenience which may result to the mercantile world from the view I am now taking of this case; but on this I lay no stress whatever, for it is not to lay down any rule of general operation for the future, as it turns on the language and construction of a particular instrument, which may be differently framed hereafter, and by common prudence might have been, since the decision in *Hutton v. Bragg*. It has been admitted in the course of the argument, and is self-evident, that a ship may be let to hire, so as to constitute the hirer the owner for the voyage, if it appears on the face of the charter-party that such is the intention of the parties. This may be done either by express words of hiring and letting, or by necessary implication. It has been said, however, that the mere words of hiring and letting, will not of themselves import a parting with the possession of the vessel, if they be restrained by the subsequent parts of the instrument, or in other words, that the construction must be on the whole of such instrument taken together. To this I agree, subject to this qualification, viz. that if the separate provisions of the instrument be manifestly repugnant to giving such a construction to the general words, they ought not to be received. But if there be no repugnance, as the general words are emphatic and essential, they can-

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not be rejected, but must operate according to their common and received legal import. The question, therefore, comes to this, (there being nothing incongruous in letting a ship to hire, so as to make the hirer the owner for the time) viz. it depends on the nature of the instrument, and resolves itself into a mere point of construction and intention of the parties. I fully concur with the counsel for the defendant, that the general words and special provisions contained in the charter-party must be particularly attended to. The general words at the beginning of that instrument are, "that the defendant, as ship owner, granted, and to freight let," and that *Laing*, the charterer, "hired and to freight took" the ship *Ann* for the voyage, upon certain conditions contained in the charter-party. If these words of letting be taken by themselves, they might apply equally to the letting of land, a house, or a ship, and might pass the possession of the one equally as well as the other, although the subject-matter intended to pass, would be of a different nature; still, however, they are words of grant and demise, and pass the possession in each particular case. Lord *Ellenborough* was of that opinion in the case of *The Master of the Trinity House v. Clark*, for his Lordship there observed (a), that "the charter-party 'grants' the ship, and 'lets it to hire and freight,' which are proper words of lease, and would of themselves pass the possession. The purpose is mentioned, but this mention of the purpose does not restrain the possession, though it may restrain or qualify the use of the thing let to hire." The words of demise in the charter-party, in that case, are precisely similar to the present; and I refer to it, not as being in point as to this decision, but as to the construction of those particular words, they being similar in both instruments. Thus far at least, Lord *Ellenborough's* opinion supports my view of this case. In *Saville v. Campion*, Lord Chief Justice *Abbott* said (b), that "the terms of the charter-party in the case of *Vallejo v. Wheeler*, are not very clearly shewn in the report of the case; but it has always

(a) 4 Maul. & Selw. 295.—(b) 2 Barn. & Ald. 512.

been considered that the ship was thereby let to freight." In the case of *The Trinity House v. Clark* the deed was in that form; and in the judgment in that case, great reliance was placed on the objects and purpose, as well as on the terms of the deed." His Lordship therefore recognized the words of Lord *Ellenborough* as to letting the vessel to freight in the case of *The Trinity House v. Clark*, as forming an operative part of his judgment, and afterwards observed that "the charter-party, in the case of *Hutton v. Bragg*, was also in terms of letting to hire, although it did not distinctly appear by the report;" and added, that "in the case then before the Court the charter-party contained no such terms." He thereby avoided giving any opinion contrary to the decision of *Hutton v. Bragg*; but merely adverted to the distinction between the charter-parties in those two cases. I do not cite *Saville v. Champion* for the whole of the case, as being applicable to the present, but merely as to the construction of the words of demise in the charter-party; for I believe the opinions of the Judges of the Court of King's Bench are not probably favorable on the whole to the decision in *Hutton v. Bragg*, although they have not expressed it, but merely drawn a distinction between the two cases. Here, however, it has been said, that the words "letting to freight" are to be understood in opposition to "letting of the ship," and merely specify the mode in which the ship was to be employed; but to this I answer, that the words were precisely the same in the case of *The Trinity House v. Clark*, where no such distinction was attempted to be taken, and in which the construction was expressly put as in the subsequent case of *Saville v. Champion*, that such words by themselves would pass the possession of the ship. Here, however, it must be observed, that the words in the charter-party are not confined to "letting to freight," but that the charterer "hired and to freight took the ship" for the voyage. If these words therefore, imply more than a mere letting of the vessel, and would of themselves pass the possession of the

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ship, what is there repugnant to them in the other covenants contained in the charter-party, or what by any possibility, could turn such words round to a different meaning or construction from what they would otherwise bear? In the first place, it is in terms, a taking and letting of the whole of the ship, not of so much for tonnage, or according to a settled rate of tonnage, but a gross sum to be paid for the whole of the voyage. It was therefore competent to the charterer to contract with others for the freight of their goods, or to put her up as a general ship for the voyage contracted for, immediately on the execution of the charter-party. The contract made by such persons would consequently be with the charterer, and not with the ship owner, as here, where the goods were put on board on a contract entered into with the charterer, and not with the defendant as general owner. Thus far, there is nothing repugnant in the provisions of the charter-party to a general letting or hiring; but it has been said that the master and crew were appointed by the owner; that the management of the ship was vested in and remained with the master; and that she was to be victualled by the owner; and consequently that this constituted a continuing possession in him, and that the charter-party merely amounted to a covenant on the part of the owner to convey goods for the freighter, so as not to disturb his original ownership—and this point has been chiefly relied on. Although it may be entitled to great weight, I cannot consider that those stipulations for the mere management of the ship, over-ride the general words of the granting and letting. A ship may be let, with a stipulation that she shall continue to be navigated as before; so, the services of the master and crew may be let together with the ship; but whether they be so let or not, will depend on the nature of the instrument. For this, it is necessary again to advert to the case of *The Trinity House v. Clark*, where Lord *Ellenborough* said (a), “it is urged, that the use and service only of the ship are parted

(a) 4 Maul. & Selw. 296.



with, and that the possession and ownership are retained by the conduct and navigation being left to the master and crew, who are the servants of the proprietors of the ship, chosen, fed, and paid by them." But how did his Lordship meet that? "The whole argument," he observed (a), "appears to rest on a fallacy; the possession, such as it is, of the master and crew, is not retained by the proprietors of the ship, to restrain or interfere with the full and free use of the ship, which they have let to hire for a term, but as subsidiary and subservient to such use. The vessel therefore is not only hired, but along with it, the services also of a certain number of persons paid by the proprietors, and these services are necessary to the use of the vessel. "It is the same thing," said he, "as the hire of a waggon and team for a certain term, the proprietor of the waggon stipulating that it should be driven, and the horses taken care of, by his own waggoner and boy." After shortly dilating upon this comparison, his Lordship observed, "this is indeed *idem per idem*; but as the instance is more familiar, it serves to put the point in a clearer light;" and in the latter part of the judgment his Lordship is made to say (b), as a general proposition, that "the charterer of the ship is the owner *pro hac vice*, is hardly denied on the present occasion; but the precise point made here is, that this case is an exception to the general rule, because by the terms of this charter-party, the appointment of the crew and the navigation of the ship, are not transferred to the charterer, but left with the proprietor; as to which we have already given our opinion." That opinion I have before adverted to, namely, that these circumstances do not make it less a letting of the ship. Here, therefore, as in the case of *The Trinity House v. Clark*, the master and crew continuing in the employment of the owner, forms no argument against the ship being let. This, therefore comes round again to the general question—What is there in the charter-party in this case, to restrain the operation of the general

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(a) 4 Maul. & Selw. 298.—(b) Id. 300.

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words of granting and letting the ship to freight by the one party, and of hiring and taking by the other? I must here again observe, that I do not cite the cases of *Saville v. Campion*, or *The Trinity House v. Clark*, as authorities on which the decision in this case can be grounded. In the latter, the judgment of the Court was formed on two grounds, first, on the words of grant and demise in the charter-party; and, secondly, the nature of the service. If the words of letting were alone sufficient to pass the possession of the vessel, why call in aid the nature of the service; or why not rely on the nature of the service, without also calling in aid the words of hiring or letting; and further, why endeavour to enforce them as emphatic, and essential to convey the possession? The fair result of the words of the charter-party in that case, as in the present, is, I think, sufficient to constitute the freighter the owner for the particular voyage, unless inconsistent with the general effect of the grant, and although the nature of the service and employment in these cases is different, still, such difference does not appear to me to be repugnant to those general words which are therefore left in their full operation. As to the case of *Saville v. Campion*, it does not profess to overturn the decision of this Court in that of *Hutton v. Bragg*, but a distinction is drawn between them, as the former did not contain the terms of letting to hire in the charter-party, nor did the nature of the service there require that the merchant should be considered as temporary owner in any question between him or those who represented him and the defendant. Although, therefore, these words might not have made the difference, still, they were referred to as being sufficient to constitute a distinction; at all events it leaves the case of *Hutton v. Bragg* on its own ground: most probably however, that distinction was pointed out, in order that the Court would not interfere with *Hutton v. Bragg* one way or the other. I again beg to remark, that I have cited the case of *Saville v. Campion* not for the grounds of decision, as being applicable to the present, but

for the doctrine it contains. I do not rely on that of *Vallejo v. Wheeler*, as it may be confined to the question against whom barratry may be committed; and further, Lord Chief Justice Abbott, in *Saville v. Campion*, observed, that "the terms of the charter-party, in the case of *Vallejo v. Wheeler*, were not very clearly shewn in the report of that case; but it had always been considered that the ship was thereby let to freight." On these grounds, therefore, although the decision of this Court in *Hutton v. Bragg* may be doubted, I cannot consent to overturn it; not that I entertain a confident opinion, or an opinion altogether free from doubt; indeed, it would now ill become me to do so; but to overturn what has been solemnly decided, I have already said, that I must have a perfect conviction that such decision was erroneous. At present, therefore, I adhere to that decision, as I see no just ground on which it can be shaken. I am the less anxious as to the determination of this case, because, as the rest of the Court differ from me in opinion, no harm can arise to the parties; and, with respect to any general rule, the result is wholly immaterial, as parties will have no difficulty in future in framing their charter-parties so as to prevent the inconveniences that have hitherto arisen:—For all these reasons, therefore, I am of opinion that in this case there should be judgment for the plaintiffs.

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Mr. Justice PARK.—I am extremely sorry to differ from the very luminous and candid opinion which has just been delivered by my Lord Chief Justice, and as the case has been so fully and ably argued, it is impossible that any new light can be now thrown on the subject. It is greatly to be lamented that so much confusion has arisen in cases upon charter-parties, owing to their being inaccurately worded, and the terms which the parties intend to be introduced, not being understood by the persons by whom they are prepared, who are generally entirely ignorant of the rules of law. The question that arises in cases of this description, has been

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generally that of construction, or rather of fact arising out of the construction or intention of the parties, as to whether there has been an entire letting of the vessel under the charter-party, so as during the time of such letting, the owner has no controul; but the charterer has the full disposition of her, or, in other words, to use the language of the late Lord Chief Justice Gibbs, in *Tate v. Meek* (a), "whether the delivery of the cargo, and the payment of freight, were concomitant acts?" When that fact is ascertained, there can be no doubt as to the legal result, and when the distinction is attended to, the different cases may be all explained, although they cannot be reconciled; because a different construction has been given by various Judges at different times. In looking attentively through all the cases applicable to the present, I find that it is only on the entire parting with the possession of the vessel, that the charterer is to be considered as owner *pro hac vice*. Thus, in *Vallejo v. Wheeler*, the charterer, whether rightly or not, was to be considered as owner; and it was admitted in *Saville v. Campion*, that all the rights and privileges of owner attached upon him *pro hac vice*, in a question of barratry. There is a great distinction between cases of barratry under the insurance law, and those which turn on instruments of the description of the charter-party in question. In *Soares v. Thornton* the question was, whether the charterer could be so far deemed owner, as to prevent his being defrauded of the benefit of his insurance through a loss by barratry, by the concurrence of the original owner?—and the Court held, that it was a loss by barratry; and that the justice of the case was advanced by considering it in that light. There, therefore, as well as in *Vallejo v. Wheeler*, it was decided, that in a question of barratry, where the ship-owner demises the hull of the ship to the freighter, it constitutes him owner *pro tempore*. In the case of *The Trinity House v. Clark*, the decision of the Court turned entirely on the construction of the charter-party, and it was considered that the words

(a) Ante, vol. ii. page 293.

of letting amounted to an absolute transfer of the ship. There, the contract contained in the charter-party was not for any specific voyage, but for various duties and stations, to be regulated as Government might require, and the Court, in that case, considered the Crown as actual owners *pro tempore*; and Lord *Ellenborough* said (a), that "as the charter-party 'grants' the ship, and 'lets it to hire and freight,' which are proper words of lease, they would of themselves pass the possession:"—and his Lordship further observed, in commenting on the expressions contained in the charter-party (b), that "It is evident that the service contracted for, is of the highest importance to the country, and that its most valuable interests may depend upon the immediate execution of such service, as this charter-party authorizes the Crown to require, and the proprietors of the ship agree to perform. Whatever construction of the contract enables the Crown to enforce a prompt obedience to its terms, must be most agreeable to its spirit and intent. If the proprietors of the ship, from whatever motive, were authorized to insist that the officers of the Crown had no right to enter the ship, but were driven to their action on the breach of the contract, infinite and irreparable mischief might be done to the public service by the delay. The vessel, therefore, is not only hired, but along with it also the services of a certain number of persons who are paid by the proprietors, and these services are necessary to the vessel, which the proprietors have expressly warranted to the Crown." Upon that ground, the case of *The Trinity House v. Clark* was principally decided, and if it had turned solely on the letting of the ship to hire and freight, there would have been no reason to call in aid that argument. If all the covenants contained in the charter-party in this case are severally looked at, I think they are altogether repugnant to the ship's being actually parted with, or absolutely let to freight by the original owner. Although the general words in the beginning of that instrument

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(a) 4 Maul. & Selw. 295. — (b) Id. 297.

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set out by stating, that the owner has "granted and to freight let, and the freighter hired and to freight taken," still, the whole of the instrument must be taken together, and its construction will not depend upon every particular sentence, but whether on the whole, it was the intention of the parties, that the owner should part with the absolute possession of the vessel to the freighter. In *Soares v. Thornton*, the different provisions contained in the charter-party were all commented on, by Lord Chief Justice Gibbs, and the judgment of the Court proceeded on the whole of the construction of that instrument. In *Morgan, d. Dowding v. Bissell*, Lord Mansfield said (a), that "when a party enters into that, which on the face of it appears to be an agreement, though there are words of present demise; yet, if you collect on the face of the instrument the intent of the parties to give a future lease, it shall be an agreement only." That, therefore, established the position, that whether an instrument shall be a lease, or only an agreement for a lease, must depend entirely on the intention of the parties, as it is to be collected from the whole of the instrument. In the case of *Yates v. Railston*, the defendant, as owner of the ship, granted and let her to the freighter, who took the same to freight, for the voyage. These words are in effect precisely similar to the present; and there it was held, that the owner had a lien on the cargo, till he was satisfied for the amount of freight remaining due upon it, and judgment was accordingly found for him. The words, "granting and taking to freight," therefore, are not of themselves conclusive, although they may be strong to shew the intent of the parties, when coupled with the other stipulations contained in the charter-party. Here, the defendant, as owner, covenanted that the vessel should be "well manned, tackled, apparelled, and furnished for the voyage, as mentioned in the charter-party, and that the master should receive, and properly stow on board her, all such goods as the freighter might think proper to send alongside at Lon-

(a) 3 Taunt. 72.

*don*, and deliver the same to his agents or assigns at *Newfoundland*." This provision of itself imports, that the goods were to be received on board by the master on account of the defendant, as owner, who undertook to deliver them to the agents of the freighter; and it is impossible that he could make such delivery unless the goods were in his possession. Here, therefore, there are cross covenants, unlike those contained in the charter-party in *Hutton v. Bragg*. Further, these covenants would be altogether nugatory, if the freighter had the entire possession of the vessel; for then he might receive and deliver goods when and where he pleased. The owner also agreed, that "due assistance should be given with the ship's boats, properly manned for that purpose, in loading and unloading the cargoes, provided no impediment was thereby made, in carrying on the exclusive operations or duties of the ship." That, therefore, shews, that the owner had the absolute control of the vessel vested in him. The master acted on his behalf during the voyage, and was appointed by him before the vessel sailed. Even if the freighter can be considered as owner *pro hac vice*, the absolute possession of the vessel did not pass to him by the charter-party, for the duties of the ship could not be inconsistent with those of an absolute owner.—In the next place, it is necessary to consider the mode of payment of the freight, as stipulated for in the charter-party. Whether such payment was to be made by bills of exchange or in money, amounts to the same thing; and here, it is quite clear, that the delivery of the cargo, and the payment of freight, must be considered as concomitant acts. Indeed, I may go further, for the delivery of the bills by the freighter, was to precede the delivery of the cargo; as he stipulated to pay the whole of the freight that remained due, by bills of exchange at two months date, from the day of the ship's report inward in the port of *London*. It is not merely to be inferred from the terms of the charter-party, that the master and crew were to be maintained by the owner, for it is found

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as a fact in the case, that they were hired and employed to navigate the vessel on the voyage mentioned in the charter-party, and that she was so navigated at the owner's expence. Under these circumstances, therefore, I do not think that the owner had given up the control or possession of his ship to the freighter, and this conclusion may be warranted by a number of recent decisions. The case of *Tate v. Meek*, in which this Court had the great assistance of the late Lord Chief Justice *Gibbs*, appears to me to be nearly in point. It is true, that the charter-party there, did not contain the words "let to freight," but in every other respect it is directly applicable to the present; and although they are introduced in this case, I have endeavoured to shew that they are not to be considered as conclusive, if by the subsequent restrictions in the charter-party, it was not the intention of the owner to give up all his control over the ship; and more particularly so, as he expressly covenanted to receive and deliver the goods, and the bills to be given in payment for the freight, were to precede the delivery of the homeward cargo. In *Yates v. Railston*, the owner, by charter-party, granted and let the ship to the charterer, who took the same to freight; and the same construction was adopted as in the previous case of *Tate v. Meek*; and Lord Chief Justice *Gibbs*, in delivering the judgment of the Court in *Yates v. Mennell*, observed, that "it must be governed by the same remarks as those preceding it," although the charter-party did not express that the vessel was granted and letten to freight.

Since those cases were decided in this Court, that of *Saville v. Campion* has been determined in the *King's Bench*, and the whole of the reasoning adopted by Lord Chief Justice *Abbott*, in delivering the judgment of that Court, bears most strongly on the present. It is true, that there, the charter-party contained no terms of letting to hire, as in this, and the freighter was to superintend the stowage of the goods; and it was contended, that it was immaterial that the charter-party did not contain the words "let to

freight," for that, if upon the whole of the instrument it appeared to be the intention of the parties that the owner should divest himself of the possession of the ship, and the charterer come into it; it was substantially a letting to freight for the voyage, as it was sufficient to constitute a lease; and Lord Chief Justice *Abbott*, on commenting on that part of the argument, said (a), that "it was observed, that although the charter-party in that case did not contain any terms of demise or letting to freight, as in the instrument in the case of *Hutton v. Bragg* was assumed to do; yet, that it contained matter equivalent to such words; as a lease for years of a chattel real may be made without express words of demise, any words plainly shewing that the one party is to give up to the other, and the other to take and hold possession of the land for a definite time, being sufficient to constitute a lease. This latter proposition," observed his Lordship, "is undoubtedly true; but" said he, "upon an attentive consideration of the charter-party in the present case, we find nothing either in its language or in its object, which imports that the merchant charterer was to have the possession of the ship. The whole instrument contains matter of contract and covenant only." His Lordship then commented on the different clauses and stipulations contained in the charter-party in that case, and after observing on those of *Vallejo v. Wheeler*, *The Trinity House v. Clark*, and *Hutton v. Bragg*, said, that "the judgment of that Court would be conformable to this, in the case of *Tate v. Meek*, and to the principle on which the judgment in *Bohtlingk v. Inglis* was founded."—That case has been shortly alluded to in the course of the argument, and does not appear to me to be altogether immaterial to the present inquiry. There, a trader in *England* chartered a ship upon certain conditions for a voyage to *Russia*, to bring goods home from his correspondent there, who accordingly shipped the goods on account and at the risk of the freighter, and

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(a). 3 Barn. & Ald. 510;

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sent him the invoices and bills of lading of the cargo;—and it was held, that the delivery of the goods on board such chartered ship, did not preclude the right of the consignor to stop the goods while *in transitu*, on board the same, to the vendee, in case of his insolvency in the mean time before actual delivery, any more than if they had been delivered on board a general ship for the same purpose. The ground of decision in that case was founded on the circumstance, that the owner had not parted with the control of his ship by the charter-party. The Court of *King's Bench*, therefore, must have contemplated such a case as the present, when that was decided; and Mr. Justice *Lawrence*, in delivering the judgment of that Court, said (*a*), that “the vendee had no control over the ship, and had merely contracted with the master, to employ his ship in fetching goods for him;”—and that learned Judge drew a distinction between that case and *Fowler v. Kymer* (*b*), where the consignees were in possession of a ship let to them for three years, at a certain sum *per month*, and had always found the stock and provisions for her, and paid the master, during which time they were to have the exclusive and entire possession of the ship, and the complete control over her. On that distinction, I principally ground my opinion in this case; for as respects the owner's right to stop *in transitu*, unless the circumstances of possession be very express, the chartered ship must be taken to be in the possession of the master.—Although there may be some distinction between this case and that of *Hutton v. Bragg*, I must confess that the decision I have now formed, is in express contradiction to it;—and although I concurred in that judgment, I trust, that if I discover that I have erred, I shall never be ashamed to avow or correct my error. I there thought, with the late and present Lord Chief Justices of this Court, that there was an entire letting and parting with the possession of the ship. That, however, is a mere question of fact, to be derived from the language contained

(*a*) 3 East, 397.—(*b*) Sec 7 Term Rep. 442. 1 East, 522.

in the charter-party, on the construction of which, one Judge may differ from another in opinion; and if it appear from the whole of the instrument, that the ship is to be let in terms, it will fall within the distinction to which I have already adverted. That this Court were of opinion, in *Hutton v. Bragg*, that the owner had parted with the possession of the ship, appears to be clear from the subsequent decisions, in *Tate v. Meek*, *Yates v. Railston*, and *Yates v. Mennell*, when the former case came fully under consideration. In the latter, we considered that the entire possession had not been parted with. Perhaps, therefore, the one case may be reconcileable with the others. Lord Chief Justice Abbott also observed, in *Saville v. Champion*, that “the charter-party in the case of *Hutton v. Bragg*, was in terms of letting to hire.” Whether, however, that case was rightly decided or not, is not for me to determine;—but in this case, I am satisfied, that the owner has not parted with the actual possession of the vessel, so as to give the freighter an absolute control over her; and consequently, that the former is not liable to pay over to the plaintiffs the sum sought to be recovered by them in this action. It is immaterial to consider whether the right of lien continued after the delivery of the goods, as a notice was given by the direction of the defendant, before any of them were parted with, that none of them should be delivered without the order of his brokers. On the whole, therefore, I am of opinion, that the defendant is entitled to judgment.

Mr. Justice BURROUGH.—Before I give my opinion on the main point in this case, I shall observe on others which have arisen in the course of the argument. In the first place, I think, that if the defendant once had a lien, there is nothing in the charter-party, coupled with the facts as stated in the case, that will divest him of it. It has been said, that the mode in which the freight was to be paid would do so. By the charter-party, it was stipulated to be paid

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by bills at different times, viz. one quarter part thereof, on a right delivery of the cargo at *Newfoundland*, by good bills on *London*, at sixty days' sight;—and the remainder by good bills at two months' date, from the day of the ship's report inward in the port of *London*. It appears, that bills were given at *Newfoundland* as for one quarter of the freight, which were afterwards accepted by the freighter (the bankrupt), and dishonoured by him when they became due, and have not since been paid. These bills, too, were dishonoured before the homeward cargo was put on board. The second set of bills for the remainder of the freight, was never demanded by the defendant, nor tendered to him. It was the duty of the freighter, or his assigns, to tender those bills according to his stipulation in the charter-party. This act, therefore, does not affect the defendant's case.—Secondly, I think that the lien has not been divested by the delivery of the homeward cargo,—for it is expressly stated in the case, that on the day of the report of the vessel at the Custom-House, the defendant caused a notice to be given to the Directors of the *West-India Docks*, not to deliver any of the goods without the orders of Messrs. *Harrison and Betts*, who, it appears, were afterwards employed by the defendant to collect the freight from the respective consignees on his account, and which they accordingly received. If, however, the freighter had tendered the bills on the day of the ship's report inward at the Custom-House, according to the terms of the charter-party, the defendant's lien might not have continued.—It has been further insisted, that the delivery of the goods was complete before the money claimed for their freight was paid. That, however, is not so, for the vessel was not reported at the Custom-House until the 26th *February*, 1816, and she entered into the *West India Dock* on the same day, for the purpose of discharging her cargo, and the notice was then given that none of the goods should be delivered without the order of the defendant's brokers.—It has been also contended, that the shippers of the homeward cargo at *Demerara*, were strangers

to the charter-party, and consequently, that there was no privity between them and the defendant; but I think they cannot be so considered, but must be taken to stand in the situation of charterers; for by the terms of the charter-party, the master was to take on board there, all such goods as the agents or assigns of the freighter should send alongside the vessel. These goods, therefore, must be taken to have been put on board under the charter-party, and the shippers must be considered to have acted under the authority of the freighter, and to have had notice of the nature of that instrument, and the stipulations therein contained.—After the decision in this Court, in the case of *Hutton v. Bragg*, those of *Tate v. Meek*, *Yates v. Railston*, and *Yates v. Mennell*, were tried before me, at *Guildhall*, and on its being there stated, that *Hutton v. Bragg* could not be supported, I remember to have said, that had I been in Court when it was decided, I should have concurred in that judgment; but having since considered that case with the greatest attention, I am induced to say, that I do not think it to be law, and that its doctrine cannot now be supported.—Having said thus much, I now come to the main question, as to whether the absolute possession of the vessel was parted with, by the words “granted and taken to freight,” which were used in the beginning of the charter-party. These words have been assimilated to those of demise in leases of land; but it appears to me, that no analogy can be drawn between them, for the subject-matter in each, is of a wholly different nature. In the case of a lease, the party must have the actual possession of the land, as he takes it for the purpose of cultivation. So, with respect to a lease for a house, he takes it for his actual residence; and it is necessary in both instances, that he should have the exclusive possession. It by no means follows, that although words of this description are introduced in a charter-party, that the possession of the whole of the vessel should thereby pass to the charterer. He does not require it, and when the stipulations contained in this charter-party

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are attended to, it is evident that such a right of possession cannot be supported. The master and crew were to be provided for by the owner, and were hired and employed by him, and if the freighter contracted either for part or whole of the ship, it does not follow that he was entitled to the possession of her, because he put goods on board. He merely engaged such part of the ship as is used for the stowage of goods; for the safe conveyance of which, he undertook to pay freight, and not for the hire of the whole of the vessel. The freighter was merely to send goods alongside, and the master was to receive them on board, and deliver them to the agents or assigns of the former. If the ship were in danger, the master alone could act for her benefit and protection, as being the property of the owner. A confidence was reposed in him by the owner of the vessel, and not by the charterer. In the case of *The Trinity House v. Clark*, it was deemed expedient that the possession of the vessel should pass to the Crown, as the nature of the service required it;—here, however, no such reason has been assigned. Both, therefore, by the nature and terms of the charter-party, as well as on the true construction of its object and language, I am of opinion, that there is no valid ground for saying, that the absolute possession of the vessel passed to the charterer, and consequently that the defendant, as owner, is entitled to judgment.

Mr. Justice RICHARDSON.—I am also of opinion that the plaintiffs are not entitled to recover. By the law of *England*, and all commercial countries, the owner of a ship has a lien on the cargo for his freight. That position is laid down by Lord Chief Justice *Abbott*, in his *Treatise on Shipping*, as well as by many other text writers. Such right to lien, however, may be varied by covenant or agreement between the parties. In *Buller's Nisi Prius*(a), it is stated, that no person can in any case retain, where there is a special agree-

(a) 7th edit. by Bridgman, 45 (a).

ment, because then, the other party is personally liable; and the case of *Breming v. Carrant*, is cited in support of that doctrine. Here, however, it must be considered, whether the stipulations contained in the charter-party are inconsistent with the defendant's right of lien. I am clearly of opinion that they are not; and the mere circumstance of his entering into an agreement with the charterer as to the mode in which he was to be paid for the freight or hire of his vessel, will not, of itself divest him of such right. This case, therefore, resolves itself into two questions;—first, whether the defendant's lien has been excluded by the terms of the charter-party? and secondly, whether it makes any difference, that he claims to retain for freight against the goods of strangers, after the delivery of the homeward cargo, and after having received the freight from the consignees thereof upon the bills of lading, which freight is different from that due upon the charter-party?—First, then, is the lien excluded by the general rules of law? As to this point, the case of *Hutton v. Bragg* presents a difficulty; but I think it unnecessary to give any opinion in denial of the principle there laid down, but merely the applicability of that principle to the present. The decision there turned on the ground, that by the terms contained in the charter-party, the owner had actually parted with the possession of his ship;—and it is quite clear, that in order to constitute a lien, there must be an absolute possession in the party claiming it. There may be instances in which an owner may transfer the whole of his interest in a vessel to the freighter, as if the former were to demise her for a term of years, and the latter was to have the appointment of the master and crew, and supply them with wages and provisions, and be at the expence of repairing the vessel during the term of the demise, he might be considered as owner for that period:—but such language is not usually adopted in the common form of commercial charter-parties, which, although they may vary in terms, have no other object in view, than to pass the use of the vessel to the charterer for the conveyance

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of goods for the voyage, but that the right of possession should remain with the owner. In *Hutton v. Bragg*, the Court relied on the words of demise contained in the beginning of the charter-party, viz. that "the owner had granted and letten," and the charterer "had taken the ship to freight." If it had been the manifest intention of the parties, that the entire possession of the ship should pass from the one to the other, those words must be considered as material; still, however, they are not of themselves conclusive as to that point. This appears from the case of *Yates v. Railston*, where words of a similar nature were introduced in the charter-party. That case, however, may be distinguishable from *Hutton v. Bragg*, for, in the former, the bills of lading referred to the charter-party, for it was there found as a fact, that the cargo was shipped and consigned to the freighters by bills of lading, they paying freight for the same as *per* charter-party. At least, therefore, it appears from that case, that the words, "granted and letten to freight," although material, are not of themselves decisive to shew, that the possession of the vessel passed thereby; for if they had been deemed conclusive, the owner could not have been entitled to a lien. The same observation may be applied to the case of *The Trinity House v. Clark*, where Lord *Ellenborough*, after adverting to the different covenants in the charter-party, observed (a), that, "from all the expressions in that instrument, and from the nature of the service stipulated for, which was of the utmost importance, they tended to shew that the possession passed to the Crown during the term and service of the ship." The decision of the Court there, however, turned rather on the nature of the service, than the terms of the charter-party. Here, however, the real question must rest on the intention of the parties, as it is to be collected from the whole of the instrument. The same rule is applicable to a lease of land, and whether an instrument of that description may

(a) 4 Maul. & Selw. 296.



amount to a present demise or not, must be collected from the whole of it.—With respect to the case of *Vallejo v. Wheeler*, it does not appear that the charter-party contained the words “granted,” or “letten to freight.” But, in the subsequent case of *Soares v. Thornton*, the charter-party contained no such words; and Lord Chief Justice *Gibbs*, in delivering the judgment of the Court, laid no stress as to the terms of letting.—The result of those cases is, that in a question of barratry, the freighter may be deemed ship owner *pro tempore*, whether the charter-party under which the vessel is let to him contains words of demise or not. These cases, therefore, appear to me to be inapplicable to the present, as to the right of possession;—but those of *Tate v. Meek*, *Yates v. Railston*, and *Saville v. Champion*, have established, that whether words of demise occur in the charter-party or not, the possession may remain in the original owner, for the purpose of lien. Here, however, I must again observe, that it must depend upon the intention of the parties, to be collected from the whole of the instrument. In order to ascertain such intent in the present case, it is necessary to refer to the terms of the charter-party, and the stipulations therein contained, appear to me to be wholly inconsistent with passing the absolute possession of the ship to the freighter, although in the beginning of that instrument, words containing general terms of demise are adopted. These, however, are immediately followed by a covenant by the owner, that the master was to receive and properly stow the goods on board.—He was appointed by the owner, and must be taken to have possession of the ship for that purpose. The freighter was merely to send the goods alongside, but the master, on the arrival of the vessel at *Newfoundland*, was to deliver the cargo from alongside, to the agents or assigns of the freighter. The owners of the goods, therefore, were not even to enter the ship, and the same stipulations are contained in the charter-party, with respect to the other cargoes to be delivered and received at *Demerara*.

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The shippers, therefore, were not to interfere with the owner during the whole of the voyage. It has been observed, that the name of the owner was not mentioned in the bills of lading for the homeward cargo, but that the master only was there referred to;—the owner himself might have sailed as master, if he had pleased, and the possession of the master was in effect that of the owner, so, that in strictness, it remained in him, and there is nothing to exclude his right of lien on the cargo for his freight.

As to the second question, whether the owner can claim to retain for freight against the goods of strangers, on goods shipped by them under bills of lading, after the delivery of the cargo to the consignees; I think he has not a lien on such goods to the full extent of the freight due on the charter-party, exceeding that mentioned in the bills of lading. If it were to be held otherwise, it would be contrary to the case of *Paul v. Birch*, where Lord Hardwicke decided, that although the owner had not a lien on the goods mentioned in the bills of lading for all his freight due on the charter-party, for the hire of the vessel, still, that he was entitled to retain them for the amount of the freight due on such bills of lading, in preference to the freighter; and here, the defendant has received no more than was due from each consignee. It has been further objected, that although he might have had a right of lien against those goods under the bills of lading, still that there was a complete waiver of it on his part, by the delivery of them to the consignees before the sums claimed for their freight were paid. It is a general rule of law, that if a person parts with the possession of the article upon which he has a right of lien, without enforcing payment of his demand, he is deprived of such right. Here, the owner could only be entitled to a lien on the homeward cargo for his freight, and he was bound to deliver the goods on the payment of such freight by the charterer;—but it does not follow, that he must lose his right of freight by such delivery, for the very object of his lien had reference to the payment of such freight. As, therefore, he

had a lien for the amount of the freight due on the goods, he had a right to retain the money he received in respect of such freight. His right of lien continued until the freighter had paid the amount of the freight of the vessel, or given bills for it, as stipulated by the charter-party. On these grounds, therefore, I am of opinion, that the sum paid to the defendant from the consignees, for the freight of the homeward cargo, cannot be considered as money had and received by him for the use of the freighter, or his assignees, and consequently, that there must be

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Judgment for the defendant.

Mr. Serjt. *Taddy* now applied for a special verdict; but the Lord Chief Justice observed, that according to the best exercise of his discretion, he was fully persuaded that the case ought to end here.

GUNTON v. NURSE.

Wednesday,
Feb. 7.

THIS was an action of trover for a filly, which the defendant had detained under the following circumstances:—
At the last Spring Assizes for the county of *Norfolk*, an action of trespass was brought by a person of the name of *A.* brought an action of trespass against *B.*, for taking away a filly; *B.* justified the taking as the servant of *C.*—

The Jury found a verdict for *A.* with damages, subject to a reference to *D.*, one of the jurors, to ascertain to whom she belonged, which was to depend on whether a scar should appear on a certain part of her body, and in case it should, the verdict for *A.* was to stand, if not, it was to be entered for *B.* The filly was delivered to *D.*, by the consent of all parties, and he made his award, and found her to belong to *A.*, and accordingly ordered the verdict found for him to stand. *C.*, ten days after the award, demanded the filly of *D.* who refused to deliver her, and a fortnight after, he brought an action of trover for her recovery:—Held, that the detention of the filly by *D.* did not, under the circumstances, amount to a conversion, as *C.* was no party to the original action, and as it did not appear that he was authorized by *B.* to make the demand, to whom alone *D.* was bound to deliver her, he only being liable for the damages awarded to *A.*

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Lynes, against the plaintiff's brother, for entering his close, and taking away the filly in question, which the former stated to be his property. The brother justified, that the filly belonged to the plaintiff, and that he acted as his servant and agent, and took her by his command. At that trial, a verdict was entered for *Lynes*, damages 25*l.*, subject to the award of the defendant, who was one of the Jury on that occasion;—and, by the order of reference, the filly was to be delivered to him, by the consent of all parties, and he was to retain her in his possession, in order to ascertain whether a certain scar should appear near her shoulder on the off side, which was not visible at the time of the trial, but would distinctly appear, on the shedding of her coat, which would be about the month of *May*; and if the scar should be then visible, the verdict which had been found for *Lynes* was to stand, if not, it was to be entered for the plaintiff's brother. The filly was accordingly delivered to the defendant, who kept her until the period fixed on, and on the 26th *May*, she having shed her coat, he made his award, stating, that there was a scar near her shoulder on the off side, and ordered the verdict which had been found for *Lynes* to stand, but still detained the filly in his custody. After the making of the award, viz. on the 7th *June* following, the plaintiff demanded the filly of the defendant, who refused to deliver her to him; and on the 27th of the same month, this action was commenced, and came on for trial, before Lord Chief Justice *Dallas*, at the last Summer Assizes for *Norfolk*, when it was submitted for the defendant, that it was not maintainable, under the circumstances as stated, as there had been no unlawful conversion by him. It was proved, that the plaintiff and his brother were in Court at the time of the first trial, and that they both consented to refer the cause to the determination of the defendant, and that the filly should be delivered to him for the purpose above mentioned. His Lordship left it to the Jury to determine, first, whether she belonged to the plaintiff or *Lynes*,

and secondly, whether there had been any unlawful conversion by the present defendant. On the first point, they found for the plaintiff, and on the second for the defendant. Leave, however, was granted to the latter to move to set aside the verdict which had been found for the plaintiff on the first point, and that a nonsuit might be entered.

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Mr. Serjt. *Vaughan*, in the course of the last Term, had accordingly obtained a rule *nisi* to that effect, and submitted, that as the defendant acted as a juror on the former trial, and the filly was delivered to him with the knowledge and consent of the plaintiff, to ascertain whether it belonged to him or not, he had rightly decided the question, and that his award, being against the plaintiff, was final, and consequently that he had not been guilty of a conversion.

Mr. Serjt. *Blosset* and Mr. Serjt. *Taddy* now shewed cause.—After the defendant had made his award, there can be no pretence for saying that he was entitled to detain the filly in question, as he was merely to ascertain who was her real owner. At the first trial, the Jury found that the plaintiff's brother had been guilty of a trespass, and they accordingly gave a verdict for *Lynes*, who commenced that action, and assessed the damages he had sustained at 25*l*. The record in that action could not be used in evidence on the trial of this, as the present plaintiff was no party to it. Even if it could, the defendant had no property whatever in the filly, and his refusal to deliver her to the plaintiff, when demanded, was clearly a conversion, for the latter was the party *bonâ fide* interested in her. Although the plaintiff's brother was the nominal defendant in the former action, still, the present plaintiff was bound to pay to *Lynes* the damages he had sustained, as found for him by the Jury, and on payment of that sum, he could have no title whatever to

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the possession of the filly. When the defendant, as arbitrator, had made his award, he became *functus officio*, and therefore had no right to detain the filly from that moment. By the terms of the reference, he was merely to detain her until she had shed her coat. The purpose for which she was delivered to him was then accomplished, and he was bound to make his award immediately on discovering whether she had a scar near her shoulder or not. At all events, he could only have detained her a reasonable time after the award was made; but it appears, that he kept her from the 26th *May* until the 27th *June* following, when the present action was brought, and a demand had been previously made on him by the plaintiff, on the 7th of that month. Although, in *Ogle v. Atkinson (a)*, it was determined, that a warehouseman, receiving goods from a consignee, who had actual possession of them, to be kept for his use, might nevertheless refuse to re-deliver them, if they were the property of another, still, here, the defendant had no property whatever in the filly, as she was merely delivered to him for a particular purpose, which was effected on his making his award, and he was therefore guilty of a conversion, by keeping her one month after he had determined to whom she belonged.

Mr. Serjt. *Faughan*, in support of the rule.—It appeared at the first trial, that it was extremely doubtful to whom the filly in question belonged, so much so, that it was left to the defendant to determine who the real owner might be, which would depend entirely on the appearance of a certain scar, which would not be visible until she had shed her coat; besides, the present plaintiff was no party to that action, although he might have consented that the filly should be delivered to the defendant. He determined by his award, that the property in her was in *Lynes*;—that, therefore, was decisive, and negatived the jus-

(a) 5 Taunt. 759. S. C. 1 Marsh. 323.

tification by the plaintiff's brother, that she was the property of the plaintiff. How, therefore, has the defendant, as arbitrator, been guilty of a conversion, when he has found that the plaintiff had no property whatever in the filly? Even if he had found her to belong to the plaintiff, and he had demanded her from the defendant, he was not bound to deliver her, without making further inquiry, and he merely detained her a month after his award was made. The demand to deliver her up, should in strictness, have been made by the plaintiff's brother, against whom the former action was brought; for it is quite clear, that the plaintiff himself had no right whatever to make such a demand, as the defendant, by his award, had expressly found that the filly was the property of *Lynes*.

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Lord Chief Justice DALLAS.—The only question in this case is, whether the defendant has been guilty of an unlawful conversion. An application of this description ought not to be favoured, either by law or justice. An arbitrator would be placed in a dangerous situation, if, on taking on himself to decide a question of this nature, he should be deemed liable to an action of trover, after having determined according to the best of his judgment. This leads me to consider, what are the facts of this case. An action of trespass was originally commenced by *Lynes*, against the plaintiff's brother, for taking the filly. He justified the taking, as the servant of the plaintiff, and the only question at issue between the parties in that action was, to whom she belonged, which was to depend on whether a scar should appear on a certain part of her body, or not. A number of witnesses were called to prove her identity, when at length, (the trial having lasted nearly two days), the parties consented to refer it to the defendant, who was one of the Jury, to ascertain whose property she was. If he found that she belonged to the plaintiff, a verdict was to be entered for his brother; if, to *Lynes*, the verdict for him was to stand. By the terms

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of the order of reference, that was the only point referred to the defendant, and in the result, he was to deliver the filly to the party to whom she might belong. It must be here remarked, that both the plaintiff and his brother assented to those terms, and the defendant accordingly received the filly into his care, for the sole purpose of deciding that question. He therefore detained her until the scar appeared, which was at the time when horses generally shed their coats. It also appeared, that on the 26th May, before any application was made to the defendant for the delivery of the filly, he made his award, and found her to belong to *Lynes*. The plaintiff, therefore, had no right to call on him to deliver her to him; besides, the defendant ordered the verdict which had been found for *Lynes*, for 25*l.*, to stand. He could not be entitled to have both the damages and the filly, but it is quite clear, that the plaintiff was liable to pay him those damages, before he could be entitled to her. By the strict terms of the order of reference, the arbitrator was to decide whether the filly belonged to *Lynes* or the plaintiff's brother. The latter, therefore, could alone be justified in claiming her, because he was the defendant in the previous action, and liable to pay damages to *Lynes*. That circumstance alone, therefore, might dispose of this question; for it is clear, that the plaintiff had no property in her at the time of the first trial, and if the scar did not appear, she was to be delivered to his brother, who was to pay the damages to *Lynes*, as found by the Jury. It does not appear that the plaintiff demanded the filly from the defendant in the name or by the authority of his brother, so that, as against the former, it is morally impossible that the defendant could be charged with an unlawful conversion.

Mr. Justice PARK.—I am of the same opinion, and am extremely happy to be so, as if the Court were to come to any other conclusion, it would in a great measure tend to destroy the great advantages which may arise from referring



matters of this description to an arbitrator. I shall simply confine myself to the question, whether the defendant, as such, has been guilty of an unlawful conversion? In order to answer this, it is necessary to look at the facts. The demand by the plaintiff to deliver the filly to him, was made on the 7th *June*. The defendant had previously decided, that she was the property of *Lynes*. That he was authorized to do by the terms of the order of reference. In effect, therefore, he may be taken to have said to the plaintiff, "I cannot deliver the filly to you, because I have awarded that she does not belong to you." The detention, therefore, cannot be considered as an unlawful conversion, and more particularly so, as the defendant decided on the only point in issue between the parties in the former trial, *viz.* the appearance of the scar, and there is no question but that he acted *bonâ fide*, and that the question was left to his determination with the consent of all the parties.

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Mr. Justice BURROUGH.—In the former action, *Lynes* claimed the filly in question as his property. The plaintiff's brother justified the taking her, as his servant. The plaintiff, therefore, was neither a party nor privy to that cause; but by his consent, the filly was delivered to the defendant for the purpose of ascertaining to whom she really belonged. By that acquiescence alone, did he identify himself as being interested in the former action. The purpose for which the defendant received the filly, might therefore have been given in evidence in the present action; for it appears by the terms of reference, that the property in her was to be determined by a scar, which might or might not appear. On that circumstance taking place, the defendant decided, that she belonged to the plaintiff in the former action, for he ordered the verdict which the Jury had found for him to stand, by which he was entitled to recover 25*l.* damages, for the trespass committed in taking her away. At all events, therefore, the defendant was not bound to deliver her to the plaintiff, but

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to his brother alone, nor was he obliged to do so before *Lynes* had been satisfied the damages he had sustained, and which had been found for him. Throughout the whole of the transaction, the defendant acted as arbitrator, and there can be no doubt but that he was entitled to detain the filly until he had fully ascertained to whom she belonged; and he was not bound to deliver her to any person, until the verdict for *Lynes* had been satisfied.

Mr. Justice RICHARDSON.—The only question is, whether what passed on the 7th *June*, when the demand was made by the plaintiff, amounts to an illegal conversion by the defendant? The filly was delivered to him at the time of the former trial, and was to continue in his possession as an arbitrator, for a certain period, to enable him to decide to whom she might eventually belong, and he found that she was the property of *Lynes*. It may be doubtful, whether he should have delivered her to him or the plaintiff's brother, as the former had a verdict in his favour when the demand by the plaintiff was made; but at all events, the defendant was not bound to deliver her to the present plaintiff, for it does not appear that he was authorized by his brother to make such demand. It is not stated, that he did not deliver the filly either to *Lynes* or the plaintiff's brother, but that he refused to do so to the plaintiff alone. I, therefore, concur with the Court in thinking, that this refusal did not amount to a conversion by the defendant, and that the rule for entering a nonsuit must be made

Absolute (a).

(a) It has been long since decided, that a refusal on demand may be justifiable and lawful, under particular circumstances; as if *A.* find the goods of *B.*, and upon their being demanded, answers, that he knows not whether *B.* is the true owner or not, and therefore refuses to deliver them:—this is not evidence of a conversion, if *A.* keep them for the true owner (\*). So, in *Solomons v. Dawes* (†), Lord *Kenyon* held, that in trover, where the demand of the things for which the action is brought, is not made by the plaintiff himself, who is the owner, but by another person on his account, a refusal by the defendant, on the ground that

(\*) *Per Lord Coke*, 2 Bulst. 312.—(†) 1 Esp. Nl. Pri. Cas. 83.

he does not know to whom the things belong, or that the person who applies for them is not properly empowered to receive them, or until he is satisfied by what authority the application is made, shall not be deemed such a refusal, as shall be evidence of a conversion sufficient to support such action.

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## LEWIS v. DAVIES.

Thursday,  
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MR. Serjt. *Peake* applied for a rule *nisi*, that the bail bond which had been given to the sheriff of *Cardmarthen* in this cause might be set aside, or delivered up to be cancelled, on affidavits which stated that the defendant had been arrested on a writ of *capias*, returnable in eight days of *St. Martin*, being the 18th *November* last;—that on the day preceding, *viz.* the 17th, he surrendered himself to the gaoler of the county prison of *Cardmarthen*, in discharge of his bail;—that the gaoler received a notice in writing from one of the bail to that effect, and that he returned for answer, that he had received the defendant into his custody, and that the sheriff had notice of such surrender.

Where a defendant applied to the under-sheriff, before the return of the writ, to surrender himself in discharge of his bail, which he refused to accept, without assigning any reason for so doing, and the day after, he surrendered himself to the keeper of the county gaol, which was also before the writ was returnable, and the bail bond was afterwards assigned to the plaintiff, the Court ordered the proceedings on it to be stayed, without costs.

Mr. Serjt. *Pell* shewed cause, in the first instance, on an affidavit of the gaoler, which stated, that the defendant surrendered himself on the 17th, as above stated; that his wife accompanied him, and delivered a letter from one of his bail, stating, that he was come to surrender in their discharge;—that on the 21st *November* following, the gaoler received a letter from the under-sheriff, stating, that he had given no authority for him to accept the surrender of the defendant, either before or on the return day of the writ; that he expected he had not done so, and that he had, therefore assigned the bail bond. The gaoler also swore, that he had no authority from the under-sheriff to receive the defendant into his custody, and that he remained there of his own free will. The under-sheriff deposed, that the defendant and his wife called at his office, on the 16th *No-*

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vember, delivered the letter of the bail as above alluded to, and stated, that the defendant was come for the purpose of surrendering himself in discharge of his bail, and requested him to give an order to the gaoler to accept him into his custody for that purpose; that he refused to do so, or accept the surrender; and that, on the 20th, he assigned the bail bond to the plaintiff.

The learned Serjeant contended, that the surrender under these circumstances, was not a surrender to the sheriff, so as to vacate the bail bond, as it was not accepted by him; that although, in *Maddocks v. Bullcock* (a), it was held, that if a defendant surrender himself before the return of the writ, it is a sufficient performance of the condition of the bail bond, without putting in bail, still, that in *Hamilton v. Wilson* (b), it was decided, that it was optional in the sheriff to accept a surrender of the party in discharge of the bail bond, before the return of the writ; and Lord *Kenyon* there said (c), that "after a defendant has been discharged out of custody on a bail bond, it is neither in the power of the bail to render him, nor of the party to surrender himself again into the custody of the sheriff, before the return of the writ, without the consent of the latter." Here, the defendant did not inform the gaoler that the under-sheriff had refused to accept his surrender the day before; he was therefore guilty of a fraud in the first instance, by desiring the gaoler to do what the under-sheriff had peremptorily refused. He also referred to *Plimpton v. Howell* (d), to shew that the assent of the sheriff was necessary to confirm the surrender.

Lord Chief Justice DALLAS.—Whether the assent of the sheriff to the surrender of the defendant was necessary or not, it appears to me, that the proceedings under the circumstances of this case, have been extremely vexatious. Neither is it necessary to consider whether the dissent of

(a) 1 Bos. & Pul. 325. — (b) 1 East, 383. — (c) Id. 390. —
 (d) 10 East, 100.

the under-sheriff is equivalent to a dissent by the sheriff himself. The defendant surrendered himself to the gaoler the day before the return of the writ, previously to which, he had applied to the under-sheriff to render himself, and the latter assigned no reason why he did not accept it; and afterwards, with a full knowledge of all the circumstances, he assigned the bail bond to the plaintiff. The under-sheriff might probably have been the attorney to the plaintiff. Without, therefore, interfering with previous decisions, I think that under the circumstances, the justice of this case would be best met, by staying the proceedings on the bail bond, without costs.

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Mr. Justice BURROUGH.—It appears that the under-sheriff refused to accept the surrender which was offered to him by the defendant, and that he was aware of the circumstance of his having rendered himself to the county gaol, notwithstanding which, he afterwards assigned the bail bond to the plaintiff. It therefore appears to me, that the proceeding on his part was oppressive; I therefore concur with my Lord Chief Justice, and do not see what injury the sheriff has in fact sustained.

Mr. Justice PARK and Mr. Justice RICHARDSON concurring, the rule to stay the proceedings on the bail bond was made

Absolute, without costs (a).

(a) In *Turner v. Wheatley* (*), the Court of Exchequer held, that surrender of the principal by bail below, after bail above put in, but not perfected, though before assignment of the bail bond, did not discharge the bail to the sheriff after the return of the writ; but in *Callaway v. Seymour* (†), it was determined, that if the defendant surrender himself to the sheriff, before or on the return day of the writ, the bail bond may be given up to be cancelled; after which, the plaintiff cannot take an assignment of it.

(*) 1 Price, 262.——(†) *Easter Term, 42 Geo. 3. K. B. Tidd's Prac.* 7th edit. 248.

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SPITTLE v. LAVENDER.

A., an auctioneer, being employed to sell an estate belonging to B., entered in to and signed an agreement with C., for the purchase, in his own name, as agent of B., and B. shortly afterwards signed it, and added, "I hereby sanction this agreement, and approve of A.'s having signed the same on my behalf:"—Held, that A. was not personally responsible.

THIS was an action of *assumpsit*, brought by the plaintiff, to recover a deposit made by him on the purchase of an estate, as well as damages he had sustained, in consequence of the defendant's not having produced a good and sufficient title to the property intended to be conveyed to him by such sale.—The defendant was an auctioneer, and, in the year 1817, was employed by a Mr. *Randall* to dispose of an estate of his, which was accordingly advertised to be sold by auction in the early part of that year, but as no bidding was made equivalent to its value, it was afterwards sold by private contract to the plaintiff; and the following agreement was entered into between the parties:—

"An agreement had, made, concluded and agreed upon, this 15th *July*, 1817, between *Charles Lavender* (the defendant), of *Elstow*, in the county of *Bedford*, auctioneer, as agent for and on the part and behalf of *Samuel Randall*, of the same place, of the one part, and *William Spittle* (the plaintiff), of *Pinner*, in the county of *Middlesex*, of the other part:—First, the said *C. Lavender*, in consideration of the sum of 1500*l.*, to be paid by the said *W. Spittle*, as hereinafter mentioned, doth hereby, for the said *S. Randall*, his heirs, executors, and administrators, and every of them, promise by these presents, that he the said *C. Lavender*, his heirs and assigns, and all and every other person and persons claiming or to claim, any right, title, or interest under him, or any other person or persons whomsoever, of, in, or to the hereditaments and premises hereinafter mentioned, shall and will, at the proper costs and charges of the said *S. Randall*, his heirs, executors, administrators, and assigns, on or before the 4th *October* next, make out and produce a good and clear title to, and at the costs and charges of the said *W. Spittle*, by such conveyances, ways,

and means in the law, as he the said *W. Spittle*, his heirs and assigns, or his or their counsel, shall reasonably devise, advise, or require, well and sufficiently grant, sell, release, convey, and assure to the said *W. Spittle*, and his heirs, or to whom he or they shall appoint or direct, all those messuages or tenements, &c. with the appurtenants (describing the property to be sold), with covenants to be therein contained, that the said premises, at the time of executing such conveyance, are free from all incumbrances and demands whatsoever, and all other usual covenants:—In consideration whereof, the said *W. Spittle*, for himself, his heirs, executors, administrators, and assigns, doth hereby covenant, promise, and agree, to and with the said *C. Lavender*, his heirs, executors, and administrators, by these presents, that he the said *W. Spittle*, his heirs, executors, or administrators, or some of them, on having such good title made out and produced, and the said premises so assigned and conveyed to his heirs and assigns as aforesaid, shall and will, well and truly pay, or cause to be paid, unto the said *C. Lavender*, his heirs, executors, or administrators, as agent for the said *S. Randall* as aforesaid, the aforesaid sum of 1500*l.*, for the same, in manner following (that is to say), 150*l.*, part thereof, at the signing hereof, the sum of 850*l.* at the time of executing the conveyance deeds, and the remaining sum of 500*l.* on 15th *July*, 1818; but as the conveyance deeds will be executed on the 4th *October* next, the said *W. Spittle* is to execute a mortgage of all the aforesaid premises to the said *S. Randall*, as a security for the said sum of 500*l.* Witness their hands, the day and year first above written.

(Signed) “ *Charles Lavender.*

“ *William Spittle.*”

“ Witness, *T. Times.*”

“ I hereby sanction this agreement, and approve of *C. Lavender* having signed the same on my behalf.

(Signed) “ *Samuel Randall.*”

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The first count of the declaration set out the agreement *verbatim*, (omitting the memorandum and signature of *Randall*), and after stating mutual promises, the plaintiff averred, that although he had paid to the defendant the sum of 150*l.* in part of the purchase-money, on the day of signing the agreement, and was ready to pay the remainder, on having a good title produced, at the time of executing the conveyance deeds; and that although the defendant was requested, at the costs of *Randall*, to make out and produce a good title to the premises;—assigned for breach, that the defendant would not make out a good title to the plaintiff, nor convey the said premises to him, by reason whereof, he not only lost the said sum of 150*l.* but had also been deprived of the benefits which he would have derived in the completion of the purchase, and had also incurred certain costs and expences, amounting to 200*l.*, in defending a certain suit instituted against him by *Randall*, on the equity side of the *Exchequer*, to compel a specific performance of the agreement entered into by the plaintiff for the purchase of the said premises, which suit was afterwards dismissed, in consequence of *Randall*'s inability to make a good title thereto. The second count was similar to the first, omitting the special damage as to the suit in the *Exchequer*. To these were added the common money counts.—The defendant pleaded *non-assumpsit*, except as to 150*l.*, and a tender of that sum.—Replication and Issue.

At the trial of the cause, before Lord Chief Justice *Dallas*, at *Westminster*, at the Sittings after the last Term, it was proved by *Times*, the attesting witness to the agreement, that he saw the defendant sign it, and that in a short time afterwards *Randall* also signed his name to it, and added, that “he sanctioned the agreement, and approved of the defendant's having signed it on his behalf,” This, it appeared, was done with the knowledge and concurrence of

the plaintiff.—For the defendant it was contended, that as he only acted as the agent of *Randall*, in selling his estate, he was not personally liable on this agreement, but that *Randall* alone was answerable, as the principal. The Jury, however, found a verdict for the plaintiff, damages 200*l.*; but leave was given the defendant to move to set it aside, and enter a nonsuit, in case the Court should be of opinion that the plaintiff was not entitled to recover.

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Mr. Serjt. *Lens*, on the first day of this Term, having accordingly obtained a rule *nisi*,

Mr. Serjt. *Vaughan* now shewed cause, and submitted, that whether the defendant was personally liable or not, would depend entirely on the common import of the words, and the intention of the parties, which must be collected from the construction of the whole of the agreement. It is quite clear, that the plaintiff intended to have the defendant's security, as well as that of *Randall*, as it appeared at the trial, that the latter was in indigent circumstances. By the terms of the instrument, the defendant himself contracted to convey, and there is a sufficient consideration for his consenting to become security for *Randall*, for the payment of the purchase money was to be made to him, and he was to make out and produce a good title to the premises, at the costs of *Randall*. There is nothing illegal on the face of the instrument, and unless the defendant were to be deemed liable, he would have never signed it as an agent, when *Randall*, who was his principal, was near at hand, and signed it so shortly afterwards. If it was intended, that the agreement should be inoperative as to the defendant, his name should have been expunged, and that of *Randall* introduced in its stead, in the body of it. It is a general rule, that words in an instrument of this description, must be taken most strongly against the person making it.

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The plaintiff would not have been justified in paying the purchase-money to *Randall*, and therefore he paid the 150*l.* to the defendant, as a deposit, when the agreement was signed. It does not appear that *Randall* was present at the time, and it is evident from the memorandum at the bottom of the instrument, that he did not place his signature to it, until after it had been signed by the plaintiff and defendant, and the sum for which the action was brought had been deposited with the latter. If the plaintiff had paid *Randall* the consideration-money, the defendant would have claimed a lien on it, but having made such payment to the defendant according to the terms of the agreement, he was wholly absolved from any further obligation to *Randall*, as the instrument was perfect in itself when it was signed by the plaintiff and defendant. The memorandum by *Randall* merely ratified the act done by the latter, and if it tended to alter the terms of the agreement, it would have required a new stamp. In *Appleton v. Binks*(a), a person who covenanted for himself, his heirs, &c. under his own hand and seal, for the act of another, was adjudged to be personally liable, though he described himself in the deed as covenanting for and on the part and behalf of such other person; and the Court there observed, that "the party to whom the covenant is made, may prefer the security of the covenantor to that of his principal, and that there was nothing against law in the defendant's covenanting for himself, not in the name of his principal, if he will bind himself for his principal." If the defendant had acted as an attorney, instead of an auctioneer, and had used the name of solicitor, instead of agent, it is quite clear that he would have been bound by the agreement; for in *Burrell v. Jones*(b), where the solicitors of assignees of a bankrupt tenant, upon whose lands a distress had been put by the landlord, gave a written undertaking, stating, that "they, as solicitors to the assignees,

(a) 5 East, 148. — (b) 3 Barn. & Ald. 47.

undertook to pay to the landlord his rent, provided it did not exceed the value of the effects distrained;—it was held, that they were personally responsible. There, the undertaking was in writing, as here, and the Court drew a distinction between that case and *Appleton v. Binks*, as in the latter the undertaking was by deed, and therefore stronger than the former.

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Mr. Serjt. *Lens*, in support of the rule, was stopped by the Court.

Lord Chief Justice DALLAS.—The only question in this case is, what was the intention of the parties? and I fully agree with my Brother *Faughan*, that such intent must be collected from a reasonable construction of the whole of the agreement as it now stands. It will be necessary, therefore, in the first place, to consider the different characters and relative situations of the parties. The estate which was intended to be sold, was the property of *Randall*, and the defendant, being an auctioneer, was employed by him as his agent, to conclude an agreement between him and the plaintiff, as to the purchase of the estate in question. The agreement was accordingly entered into between the defendant and the plaintiff, in the introductory part of which, the former described himself as an auctioneer, and as agent for and on the behalf of *Randall*, of the one part, and the plaintiff of the other. The defendant, therefore, did not enter into the agreement on his own behalf, nor was the consideration-money for the purchase to be paid to him on his own account; for it is therein stated, that the defendant, in consideration of 1500*l.* to be paid by the plaintiff, not to the defendant as principal, but as thereafter mentioned, the latter, for *Randall*, his heirs, executors, and administrators, promised to make out a good title to the premises, at the costs of *Randall*:—in consideration whereof, the plaintiff, on having such good title produced, agreed to pay to the defendant,

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me to be in point for the defendant, and I am therefore of opinion that a nonsuit must be entered.

Mr. Justice BURROUGH.—It appears to me, that the execution of this agreement by the respective parties may be considered as one transaction. *Randall* must be taken as the principal, as he ratified it very shortly after it was executed by the defendant, and manifested by the memorandum and his signature, that the latter acted as his agent, and that he sanctioned the agreement he had entered into on his behalf. If the same terms had been used throughout the body of the instrument, as were adopted at the beginning, the intention of the parties would be manifest, and the question would stand on its true ground. The cases of *Appleton v. Binks* and *Burrell v. Jones*, are altogether distinguishable from the present, as in the former, the defendant bound himself by deed, and in the latter, the defendants undertook as solicitors of the assignees, and not as their agents; and if they were not bound by that undertaking, no one else would, for the import of the instrument was, not that the assignees undertook through the medium of the defendants as their solicitors; but that the defendants themselves undertook, as acting in the capacity of solicitors. Here, however, the defendant acted as the agent of *Randall*, and on his behalf; and he afterwards adopted the acts done by him as such, by signing and sanctioning the agreement.

Mr. Justice RICHARDSON.—I think there is an obscurity in some parts of this instrument; but taking the whole of it together, I fully concur in opinion with the rest of the Court, and more particularly so, as the memorandum and signature by *Randall* were so soon added to it, that it may be considered as forming part of the same transaction. It is clearly expressed at the head of the agreement, that the defendant acted only as agent for *Randall*, and that he

thereby promised for *him*, his heirs, executors, and administrators. That, therefore, distinguishes this case from that of *Appleton v. Binks*, where the defendant covenanted for *himself* and his heirs. Here the difficulty arises from the name of the defendant being afterwards inserted by mistake for that of *Randall*; for he promised, that he, the defendant, his heirs and assigns, and every other person claiming any right, title, or interest under him, or any other person whosoever, of, in, or to the premises, should make out and produce a good title thereto, but at the proper costs and charges of *Randall*, and also by such conveyances as the plaintiff should reasonably devise or require. This clearly shews the intention of the parties to have been, that *Randall* should make out the title of conveyance, and not the defendant. On looking therefore, to the whole of the instrument, the defendant acted merely as the agent of *Randall*, and referred to him as his principal, who afterwards sanctioned his acts, and confirmed the agreement he had entered into on his behalf. This, therefore, must be considered as one transaction, and the rule to enter a nonsuit must be made

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Absolute.

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THOMSON v. ADAM.

Where, by a bill of lading, goods were to be delivered "to the defendant, nett proceeds paid to the plaintiff, or to his assigns, he or they paying freight for the said goods as *per* charter-party:"—Held, that the freight was to be paid by the defendant, and that the nett proceeds to be paid the plaintiff were what remained after such freight and other charges had been satisfied.

THIS was an action of *assumpsit* for money had and received, and brought by the plaintiff to recover the sum of 226*l.* 1*1s.*, being the nett proceeds arising from the sale of a cargo of oranges, which were consigned to the defendant, under a bill of lading, which stated that "three hundred and seventy six boxes of oranges had been shipped by one *Leslie*, to be delivered in *London*, to Mr. *John Adam*, (the defendant), nett proceeds paid to *Hugh Thomson*, Esq., (the plaintiff), as *per* advice, or to his assigns, he or they paying freight for the said goods as *per* charter-party." The vessel had been chartered by *Leslie* and the defendant, on a voyage from *London* to *St. Michael's*, and back; and was delayed on account of the improper conduct of the master; and on her arrival in *London* from the homeward voyage, the oranges were sold by the defendant, at two-thirds less than they otherwise would have done, in consequence of the delay. The freight and other charges amounted to 168*l.* more than the sum received on their sale. An action was brought on the charter-party, against the defendant for freight, which was resisted by the advice of the plaintiff, who contended that the freight was to be paid by him under the bill of lading, and consequently that he was entitled to the proceeds of the sale of the oranges;—that the owners could not recover, on account of the improper conduct of the master, and that they were liable to defendant and *Leslie* as charterers in a larger sum than the freight claimed.

At the trial of the cause, before Lord Chief Justice *Dallas*, at *Guildhall*, at the Sittings after the last Term, the Jury found a verdict for the plaintiff, but leave was given the defendant to move to set it aside, and enter a nonsuit, in case the Court should be of opinion that the plaintiff was not entitled to recover.

Mr. Serjt. *Vaughan* on a former day in this Term having accordingly obtained a rule *nisi*, on the ground, that the plaintiff was not entitled to the nett proceeds of the oranges under the bill of lading, until the freight had been paid by the defendant, who was liable to be sued for it, as consignee; as that was the ordinary construction to be put on the instrument, that if the freight and charges were paid, there would be no proceeds, and that the plaintiff could be only entitled to recover the surplus after such freight was paid.

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Mr. Serjt. *Lens* now shewed cause, and insisted that the plaintiff was entitled to recover the sum for which the oranges were sold, as he was the person really and *bonâ fide* interested in them; that the defendant was merely consignee for the purpose of the sale, and that he was not liable to pay the freight, but the plaintiff, to whom the nett proceeds were to be paid by the bill of lading. The words *he* or *they* paying freight, can only refer to the last antecedent, which was *Thomson* (the plaintiff) and he is consequently entitled to recover.

Mr. Serjt. *Vaughan*, in support of the rule, was stopped by the Court.

Lord Chief Justice DALLAS.—I entertained no doubt whatever at the trial, nor do I now; the only question is, whether, under the terms of the bill of lading, the plaintiff or defendant is to pay freight? If the words “nett proceeds to *Hugh Thomson*, or to his assigns,” had not been inserted therein, or if they had been included in a parenthesis, it would have been quite clear that the freight must have been paid by the defendant; the effect of those words is, that the nett proceeds were to be paid to the plaintiff, but such proceeds are only those which may remain after the freight and other charges are paid.

Mr. Justice PARK.—I also think that this case is altogether free from doubt; the printed words adopted in the bill

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of lading, are in the usual form. Those of "or to his assigns," related to the defendant, to whom the cargo was consigned, and who was bound to pay the freight, after which he was to pay the nett proceeds to the plaintiff. Though it is stated that such proceeds were to be paid to the latter, it is quite clear that he could not be entitled to them until the freight had been paid by the defendant as consignee.

Mr. Justice BURROUGH concurred.

Mr. Justice RICHARDSON.—It is quite clear that the freight was to be paid by the defendant, to whom the oranges were consigned. If the bill of lading were to be construed as contended for by my Brother *Lens*, it would raise a condition precedent by the plaintiff to pay freight, but the mere introduction of the words "nett proceeds" paid to him, does not alter or vary the liability of the defendant, as consignee, to pay freight.

Rule absolute.

Saturday,
 Feb. 10.

CHILDS v. MONINS and BOWLES.

Where two makers of a promissory note gave it to a creditor of their testator, whereby "as executors they severally and jointly promised to pay on demand, with interest:"—Held, that they were personally liable.

Plea, that the defendants were executors, and made the note as such, and *plene administraverunt præter*. Special demurrer thereto that they had thereby made themselves personally liable, and admitted that they had assets for the payment of the note, and that it might have been given for their own debt, and that they having promised to pay with interest, they could not become liable for it in their representative character:—Held, that such plea was bad, and afforded no answer to the action.

THIS was an action of *assumpsit* on a promissory note. The first count of the declaration stated, that the defendants made the note in question, and thereby promised to pay the sum of 200*l.* to the plaintiff on demand, together with lawful interest for the same:—By means whereof, and by force of the statute, they became liable to pay that sum, with interest, to the plaintiff. The second count stated, that they made the note as executors to one *Thomas Taylor*, deceased, and

promised to pay accordingly. There were also counts for money paid, money had and received, and on an account stated. The defendant *Monins* pleaded, first, the general issue—secondly, to the second count of the declaration, that heretofore, to wit, on, &c. at, &c. he and *Bowles* were the executors of the last will and testament of *Thomas Taylor*, deceased; and as such executors, they made the promissory note in that count mentioned, in the words and figures following, that is to say:—"Ringwould, 28th Dec. 1816. As executors to the late *Thomas Taylor*, of *Ringwould*, we severally and jointly promise to pay to Mr. *Nathaniel Childs*, the sum of 200*l.*, on demand, together with lawful interest for the same. *J. Monins, P. Bowles, Executors*,"—and that they had fully administered all *Taylor's* goods which have ever come to their hands, as executors, except goods of the value of 40*l.* The defendant *Bowles* pleaded the general issue: The plaintiff, in his replication, joined issue on the first plea pleaded by *Monins*, and demurred specially to the second, and assigned for causes, that the defendants had, by the note in the second count mentioned, made themselves personally liable to the plaintiff, and that they had in and by the said note admitted, that they had assets in their hands for the payment of the said note, and that it did not appear that the said note was given for a debt of the said *Thomas Taylor*, but might have been given as a debt of the said executors since the death of the said *Thomas Taylor*, and that the defendants had promised, in and by the said note, to pay the sum of 200*l.*, with lawful interest, and that they could not, in their representative capacity of executors, become liable for the interest due thereon, and that the defendants had become personally liable, because they had severally and jointly promised to pay, with interest, the sum in the said note mentioned, which note gives a right of action against the executors of one of the defendants who shall first die, and on that event, against the other defendant, as the survivor, and the last-mentioned executor could not be liable or sued as

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executor of the said *Thomas Taylor*, and that the plea should have been pleaded in abatement and not in bar, and that it was in other respects uncertain, informal, and insufficient, &c. The defendant *Monins* joined in demurrer. The cause now came on for argument, when

Mr. Serjt. *Taddy*, in support of the demurrer, submitted that the plea in question was no answer to the defendant *Monins's* liability on the note on which the action was founded. The promise to pay, was an admission of assets. At all events, it must be inferred, that both the defendants had assets in their hands at the time of the death of their testator, if not, they would not have bound themselves to the plaintiff. Further, by the terms of the note, they made themselves liable to pay at all events, and not out of a particular fund, as in *Jeunev v. Herle* (a); and as the payment was to be made with interest, it implies that it was to take place on a future day, which would constitute a forbearance on the part of the plaintiff to sue them for a debt arising in their own time, and raise a sufficient consideration on the part of the defendants to render themselves personally liable.

Mr. Serjt. *Vaughan*, *contra*.—The second count of the declaration, which is founded on the note, is bad in itself, as it states that the defendants are liable as executors, or at all events the plea is a complete answer to it. They are not personally liable, nor can judgment be entered up against them *de bonis propriis*, for they have pleaded that they made the note as executors and not in their own right. Although the promise was in writing, and by the statute of frauds, an executor is not liable personally without a written promise, yet such promise does not render him liable at all events, unless there be an adequate consideration. *Rann v. Hughes* (b): and here it does not appear that there was any sufficient consideration for such promise. It is true, that if the note was given in consideration of forbearance, it

(a) 2 Ld. Raym. 1361.——(b) 7 Term Rep. 350, n.

would make the defendants personally liable, but a mere promise to pay on demand, makes them chargeable only in respect of assets, and not otherwise; for a bare promise by an executor to pay, does not make him liable to answer out of his own estate, but he is chargeable only as executor, and to the extent of the assets in his hands, in the same manner as he would have been, had no such promise been made (a). In *Henshall v. Roberts* (b), a distinction was taken between terming a party executor, or describing him *as such* in a declaration; and it was there decided, that where a count upon an account stated with the plaintiff, did not say *as executrix*, but merely styled her *executrix*, that it could not be joined with counts or promises to the testator, because evidence of an account stated with the plaintiff in her own right would have supported that count. The defendants merely describing themselves as executors in the note is not material, and may be rejected as surplusage; and in *Brigden v. Parkes* (c), where the three first counts of a declaration in *assumpsit* against executors, stated promises made by the testator; and the fourth was for money had and received by the defendants "as such executors as aforesaid," stating a promise to pay by them, as executors as aforesaid, and the last was upon an account stated by the defendants "executors as aforesaid," and stating the promise to pay in the same manner;—the declaration was held bad on general demurrer. So, here, the defendants were charged personally in the first count of the declaration, and in the second the note and promise were stated to have been made by them as executors. That, therefore, was a misjoinder, and the plaintiff is not entitled to recover on the record as it now stands. Although in *King v. Thom* (d), it was decided, that where the payee of a bill of exchange indorsed it to A. and B. as executors, they might declare as such in an action against the acceptor, and Mr. Justice Buller there

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(a) 2 Wms. Saund. 137, n. — (b) 5 East, 150. — (c) 2 Bos. & Pul. 424. — (d) 1 Term Rep. 487.

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said (a), that "the only question in such cases was, whether the sum, when recovered, would be considered as assets of the testator," still, here, the note given by the defendants was not negotiable; it was neither made payable to bearer or order, nor was it transferable by indorsement, but merely an engagement by the defendants as executors to pay a debt to the plaintiff on demand. He therefore should have sued them in that capacity alone, and although they reduced their promise into writing, it did not tend to enlarge their liability.

Mr. Serjt. *Taddy*, in reply.—There can be no question as to the misjoinder, as the demurrer is founded on the plea to the second count only, and not to the whole of the declaration. The effect of the note itself is therein set out, and not the mere description of the parties to it. The defendants thereby promised to pay the plaintiff on demand, with interest, from the time of making the instrument. They must, therefore, be liable for the payment of such interest in their own right, although they promised to pay as executors. The cases of *Goring v. Goring* (b), and *Trevenian v. Howell* (c), are conclusive to shew, that if an executor promises to pay a debt at a future day, it becomes his own, and must be satisfied out of his own estate. As here, the defendants promised to pay the plaintiff on demand, such demand must necessarily be made by him subsequently to the date of the note, and as they engaged to pay with interest, it was an admission that they had assets at the time the note was given, and amounted to a request of forbearance by the plaintiff to sue them, which would raise a good consideration, although they had then no assets.

Lord Chief Justice DALLAS.—In this case, the defendants promised, as executors, to pay a certain sum, with interest, to the plaintiff, and it has been insisted that they cannot be personally liable, as they have merely promised

(a) 1 Term Rep. 489. — (b) Yelv. 11. — (c) Cro. Eliz. 91.

as such. Whether this be so or not, must not depend on such promise alone, but on the whole of the note as taken, together, which is in the following words, viz:—"As executors to the late *Thomas Taylor*, we severally and jointly promise to pay to *Childs*, (the plaintiff) 200*l.* on demand, together with lawful interest for the same."—It is necessary in the first place, to consider the effect of the words "on demand." If the demand had been made immediately after the note was given, they would, by subjecting themselves to it, have confessed that they had assets remaining in their hands out of the estate of the testator, sufficient to satisfy it. If they intended to limit their liability as executors, they might have added, that the sum in question was to be paid out of the estate of *Taylor*, their testator, when they should have funds in their hands for that purpose; but by the terms of the note, they promised not only to pay absolutely on demand, which implies that they would pay when called on so to do, and at all events; but they further engaged to make the principal sum payable with interest. That, therefore, of necessity implies, that they had sufficient property in their hands from the testator's estate, to enable them to satisfy such demand. Further, by their engagement to pay interest on the note, they induced the plaintiff to forbear to sue for his demand, and by so doing, made themselves personally and individually liable, and not as executors only, for they jointly and severally promised to pay the amount of the note on demand. In the plea in question, the defendants have stated, that they have fully administered all the goods of *Taylor* which have ever come to their hands as executors, except goods of the value of 40*l.* and that they had not, on the commencement of this suit, or since, any of his goods to be administered, except as aforesaid; but they do not state that they had no assets in their hands when the note was given: although they thereby admitted that the plaintiff had a demand on them at that time. If executors were not to be deemed liable on such a promise as the present, they would be enabled to

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defraud any individual creditor of their testator. This, therefore, appears to me to be not only a promise to pay on demand, but to fall expressly within the principle laid down in *Goring v. Goring*, because, as interest was to be added to the original debt, it necessarily imports a promise of payment on a future day, in which case, the defendants as executors, made the debt their own; and I am therefore of opinion, that they are liable in this action.

Mr. Justice PARK concurred.

Mr. Justice BURROUGH.—The plea in question appears to me to be totally inapplicable to the count to which it refers, and affords no answer to the charge contained therein. The mere insertion in the note, of the words “as executors,” cannot alter the case, if the plaintiff has a demand against them in their own right, and not in their capacity of executors. By the terms of the note, they promised to pay the plaintiff a sum on demand. If they were merely liable as executors, they should have stated in the note that such payment should be made, when assets of their testator should come to their hands, to have enabled them to do so; but according to the terms of the note, they admitted that they had assets at the time it was given;—besides, they promised to pay a certain sum to the plaintiff on demand, with interest. Such interest could not be chargeable on the estate of their testator, and they therefore rendered themselves personally liable. They could only charge his estate for the original debt, and although the giving the note in question might not have amounted to the admission of assets in their hands at the time, still, by the promise of the payment of interest thereon, they made the debt their own, as it clearly shewed that it was to be paid on a future day, and amounted in effect to a request to the plaintiff to forbear to sue them for the original demand.

Mr. Justice RICHARDSON.—The whole of the argument for the defendants rests on the introduction of the words “as executors” in the second count of the declaration, and it is therefore necessary to consider, whether the insertion of those words in the note in question, only rendered them liable to the extent of assets which might thereafter arise to them from the estate of their testator, or whether they intended to make themselves personally responsible. For this purpose, it is necessary to look at the whole of the note by which they promised to pay severally and jointly. Their liability would, therefore, have survived to their representatives. They have also promised to pay on demand and with interest. This, therefore, imports that the sum for which the note was given was not to be paid immediately, but that time was to be allowed them for that purpose. That is in the nature of a forbearance by the plaintiff to sue them for his demand. Although they may now have fully administered the effects of the testator, except a certain sum, as stated in their plea, it is no answer to the plaintiff’s right of action, which was not commenced until four years after the note was given, at which time the plaintiff’s demand accrued. The case of *Goring v. Goring* appears to me to be of itself sufficient to shew, that the defendants are personally liable; but in *Barry v. Rush* (a), where the defendant bound himself “as administrator,” to abide by an award to be made touching matters in dispute between his intestate and another; and the arbitrators awarded, that he “as administrator” should pay; it was held, that he could not plead *plene administravit* to the debt on the bond, for that the entering into the bond amounted to an admission of assets, and that the defendant should not afterwards be permitted to dispute it. So, in *Worthington v. Barlow* (b), it was decided, that if an arbitrator under a reference between A. and B. administrator, award that B. shall pay a certain sum as the amount of A.’s demand, B. cannot afterwards object that he had no assets,

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(a) 1 Term Rep. 691. — (b) 7 Term Rep. 453.

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but may be attached for non-payment. So, here, I think the defendants have taken this debt on themselves, by giving the note in question, and consequently that they are personally liable to the plaintiff in this action.

Judgment for the plaintiff.

Saturday,  
 Feb. 10.

BOWLES and CHITTY v. PERRING.

Where the mortgagee of a bankrupt's estate called on the commissioners to direct a sale, under Lord Loughborough's order of *March*, 1794, and became the purchaser at such sale:—Held, that in an action for money paid, brought by the solicitors to the assignees, he was liable to reimburse them the expenses of advertisements, and the commissioners' fees for their attendance to perfect such sale, although the estate sold was insufficient to cover the sum originally advanced by such mortgagee.

THIS was an action of *assumpsit* for money paid. The declaration contained the usual money counts. Plea, General Issue.

At the trial of the cause before Mr. Baron *Wood*, at the last Assizes at *Dorchester*, a verdict was found for the plaintiffs, damages 22*l.* 10*s.*, subject to the opinion of this Court on the following case:—

*Richard Messiter* being seised of a freehold manor and estate at *Shaftsbury*, mortgaged the same to the defendant, in the year 1812, for 7000*l.* In 1816, a commission of bankruptcy issued against *Messiter*, under which he was declared a bankrupt, and assignees were chosen, who appointed the plaintiffs their solicitors under such commission.

At the time of *Messiter's* bankruptcy, he owed the defendant the above sum of 7000*l.*, together with a considerable arrear of interest. His estate paid no dividend, being scarcely sufficient to defray the charges of the commission. The defendant, in order to obtain his money, made application to the plaintiffs, through his attorney, to learn when the next meeting of the commissioners of the bankrupt *Messiter*, would be held. A day was afterwards fixed, and the defendant's attorney having been informed of the circumstances by the plaintiffs, attended at *Bath* at that meeting, in order to obtain from the commissioners the necessary order for the



sale of the estate mortgaged by *Messiter* to the defendant. The meeting was also attended by the plaintiffs' clerk, and the defendant's attorney signed a memorandum, which, after reciting, that "in consideration of 7000*l.* paid by the defendant to *Messiter*, the latter, by indenture, granted, bargained, sold, released and confirmed, a certain farm and lands, in the county of *Dorset* :—to hold the same to the defendant, his heirs and assigns for ever, but subject to a proviso for making the same void, on payment of the said sum of 7000*l.*, with interest :—that a commission of bankrupt had been lately issued, and was then in prosecution against *Messiter* ; and that the defendant, being desirous that the farm and lands comprised in the indenture of mortgage might be sold, and the money arising therefrom, applied in the first place, in the payment of the expences attending such sale, and then in satisfaction of what should be found to be due to the defendant, for principal, interest, and costs on the said mortgage security ;—he the said attorney, did thereby, on the part of the defendant, pray the commissioners acting under the commission against *Messiter*, to inquire whether the defendant was mortgagee of any part of the bankrupt's estate, and for what consideration, and under what circumstances ; and that if they should find the defendant to be such mortgagee, they should then proceed to take an account of the principal, interest, and costs due on such mortgage, and of the rents and profits received by such mortgagee, or any person for his use, and that they should then cause due notice to be given in the *London Gazette*, and such other of the public papers as they should think fit, when and where the said mortgaged premises were to be sold, and that such sale should be made accordingly."—This memorandum was addressed to the major part of the commissioners acting under *Messiter*'s commission, three of whom afterwards proceeded, and made the following order, at *Bath*, in conformity to that of Lord *Loughborough*, of the 8th

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*March, 1794(a).*—They found, that there was due on the said mortgage, the principal sum of 7000*l.*, and a considerable arrear of interest, and therefore, in pursuance of the application made to them by the defendant's attorney, they ordered and directed, that the several lands comprised in the said indenture of mortgage, should be sold by public auction, and that the defendant should proceed to the sale thereof, and that notice should be given in the *London Gazette*, and in several other public newspapers; and that the assignees of *Messiter*, and all proper persons, should join with the defendant in the conveyances to the purchaser or purchasers thereof; and that the monies to arise from such sale should be applied, in the first place, in payment of the expences of their meeting preparatory to such sale, and also attending such sale, and then in payment and satisfaction of the 7000*l.*, and such arrear of interest as should appear to be due thereon to the defendant, and of all costs incurred by him in respect thereof; and that the surplus (if any) should be paid to the assignees of *Messiter*; but that in case the money arising from such sale, should be insufficient to satisfy the said sum of 7000*l.*, and interest, and all costs incurred in respect thereof, then the defendant was to be admitted as a creditor under *Messiter's* commission, for such deficiency, and to receive a dividend thereon out of the bankrupt's estate, rateably, and in proportion with the rest of his creditors.

In pursuance of this order, an advertisement for the sale of the estate was drawn up by the defendant's attorney, and sent by him to the plaintiffs, to peruse, on the part of the assignees. Advertisements were afterwards inserted in the newspapers, and the defendant's attorney was at the sale declared purchaser, on behalf of the defendant, for the sum of 4457*l.* The defendant's attorney prepared a draft of

(a) See Whitmarsh's Bank. Laws, 2d edit. 480.

conveyance, and sent it to the plaintiffs for their approval, on the part of the assignees. The draft being ultimately approved of, the plaintiffs procured its execution by all the parties concerned. The plaintiffs proved the following payments to have been made by them, viz. 2*l.* 8*s.* for advertisements of the sale of the estate, and 20*l.* 2*s.* for the attendance of the commissioners.

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The question for the opinion of the Court was, whether the plaintiffs were entitled to recover? If they were, the verdict was to stand; but otherwise a nonsuit was to be entered. The case now came on for argument, when

Mr. Serjt. *Bosanquet*, for the plaintiffs, submitted, that the defendant was liable in law for the expences attending the sale in question, although he was the purchaser as well as mortgagee. If a third person had been the buyer, the expences would clearly have been deducted out of the purchase-money in the first instance, and the balance paid over to the defendant as such mortgagee, in part payment of his principal and interest. He, therefore, cannot be placed in a better situation than if the estate had been sold to another. After the sale, it was the duty of the solicitors to the commission to pay the expences attending it, and deduct them from the proceeds of the estate. At all events, the plaintiffs were entitled to recover the sums paid by them for advertisements, and the attendance of the commissioners. The whole of the proceedings were for the benefit of the defendant, and the object of the order by the commissioners was to throw the expences attending the sale, on the purchaser in the first instance, and not to charge the general creditors under the commission.

Mr. Serjt. *Pell*, *contra*.—In order to maintain this action, there must be not only a consideration, but an express or implied promise by the defendant to repay the plaintiffs the

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sums stated to have been paid by them for the expences of the sale in question, or a request by him that those sums should be so paid. With respect to the item of 2/. 8s. for the advertisements of sale, it ought to be borne by the creditors under the commission, as they would have been benefited if the estate had been sold for more than it was mortgaged to the defendant. He was before entitled to its value under the mortgage deed, and could not be called on under the order of the commissioners, to defray the expences attending the purchase. So, as to the fees paid to the commissioners for their attendance, it does not appear that the meeting was held for the express purpose of the sale in question, or at the request of the defendant. It might, therefore, have been held for general purposes, although it may appear otherwise from the terms of the order. The expences attending the sale, cannot be extended to the meetings of the commissioners. The order contemplates, that the land will be at all events sufficient to satisfy the debts due to the mortgagee, as well as the expences of the sale, as the surplus is directed to be paid over to the assignees. But it does not appear, that in case of a deficiency, the expences are to be thrown on the mortgagee. As, therefore, the plaintiffs merely acted as solicitors to the assignees, they cannot be entitled to recover, and more particularly so, as they were not requested by the defendant to make the payments in question.

Lord Chief Justice DALLAS.—Is it not the duty of commissioners to take an account of the principal and interest which may be due to the mortgagee, under an order of this description, and direct them to be paid to him, after the expences attending the sale shall have been defrayed—and if the meeting had not been for the express purpose of the sale in question, would not the defendant as purchaser, have been liable to reimburse those expences? It appears to me, to be extremely doubtful, whether it was a

general meeting or not, or whether it was held specially on account of the defendant; and, speaking for myself, I should wish to have that fact ascertained, before I give any decided opinion.

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Mr. Justice PARK.—Although it has been urged that the commissioners might have met for general purposes, still, it appears that a day was fixed for their meeting, in order to obtain from them the necessary order for the sale of the bankrupt's estate, and that it was made by them accordingly, by which they directed the monies arising from the sale, to be applied in the first place, in the payment of the expences attending the same, and then in satisfaction of the mortgage-money, and interest. The plaintiffs acted as solicitors to the assignees, who must be considered as trustees for the general creditors, and were responsible to the commissioners for their fees. The defendant was culpable in having taken an insufficient security for the sum advanced by him to the bankrupt. I was a commissioner of bankrupt for many years, and it was the constant practice to adjourn to a private room, and take accounts of this description, after a general meeting had been held, and as those accounts were investigated for the benefit of an individual, it was taken as a special meeting for that purpose, although other business had been previously transacted on the same day. Here, however, it may be inferred from the facts of the case, that the commissioners met for this special purpose, for it appears that there had been previous meetings relative to this commission, and that a day was subsequently fixed, when the parties attended, and the necessary order for sale was made. With respect to the sum paid for advertisements, I am clearly of opinion, that the plaintiffs are entitled to recover, as forming expences preparatory to the sale, for by the terms of the order, notice of such sale was required to be given in the *Gazette*, and other provincial newspapers.

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Mr. Justice BURROUGH.—From my experience as a commissioner of bankrupt, I do not hesitate to say, that separate meetings may be held for purposes of this description, in the course of the same day. The sale was for the benefit of the defendant alone, as if the estate turned out to be inadequate to satisfy the sum advanced by him, he would be enabled to prove the difference under the commission. Ought, therefore, the assignees, or general creditors, to be held responsible for the expences attending such sale? The justice of the case is against the defendant. It is true, that he might have recovered under his mortgage-deed, but the present mode of proceeding was more expeditious and beneficial, than driving him to a foreclosure, and more particularly so, as the estate turned out to be insufficient to satisfy a little more than half of the principal sum advanced, together with the interest due thereon. But the application for the commissioners to sell, was made by the defendant's attorney to the plaintiffs in the first instance, and the defendant himself, having since adopted it, must abide by the consequences. Although the sum paid for the attendance of the commissioners may be considered large, they were still entitled to their chaise hire, and other incidental expences, and one guinea is the usual sum allowed on each general meeting, in the cases of country commissions. I, however, forbear from saying whether the plaintiffs are entitled to recover the whole of their demand, although there may be a general meeting for some purposes, and a special one for others, in the course of one day.

Mr. Justice RICHARDSON also expressing a doubt, whether the latter sum should be allowed to its full extent,

The plaintiffs consented to take a verdict for 5*l.* 8*s.*, being 2*l.* 8*s.* for the expences of the advertisements of sale,

and 1*l*. each for the attendance of the three Commissioners, which they would have been entitled to on a general meeting; and the Court ordered

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The verdict to be entered accordingly (a).

(a) The order of Lord *Loughborough* extends only to legal mortgages. In the case of an equitable mortgage, application must be made to the Lord Chancellor, praying an order for the sale; and in *Ex parte Gurbull* (\*), where an application was made to Lord *Eldon*, for the sale of a mortgage of the latter description, his Lordship ordered that the costs of the application, including those of the assignees, should be paid out of the proceeds of the estate.

(\*) 2 Rose Bank. Cas. 78.

LEIGH v. SHEPHERD.

Monday,  
Feb. 12.

THIS was an action of replevin for taking the plaintiff's goods under a distress for rent, on the 12th October, 1819, at *East Malling*, in the county of *Kent*. The defendant made several avowries and cognizances, but the only questions arose on the fifth and seventh (a). By the fifth, he avowed the taking in his own right, because he said that one *John Brenchley*, *William Henry Stacey*, *Courtney Stacey*, and *John Wise*, for one year next before and ending on the 11th October, 1819, and from thence until, &c. held and enjoyed one undivided fourth part (the whole into four equal parts to be divided) of the premises, as tenants thereof to the defendant, by virtue of a certain demise to them made, at the

One of several co-heirs in gavelkind may distrain for rent due to himself and his co-heirs, without an express authority from them so to do:—And an avowry by him in his own right, and a cognizance as the bailiff of the others, is sufficient, without averring any authority from them to distrain.

(a) The first avowry was in the defendant's own right, for a year's rent due to him from the plaintiff, for 1*l*. of one undivided fourth part of the premises. The plaintiff, in his plea in bar thereto, stated, that he did not hold as tenant to the defendant.

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yearly rent of 16*l.* payable on the 11th *October*, in every year, and that because one undivided fourth part of the sum of 16*l.* of the rent aforesaid, for one year ending on the said 11th *October*, 1819, was due and in arrear from them to the defendant, he well avowed the taking, &c. as a distress for the said undivided fourth part of the said rent so due and in arrear as aforesaid. By the seventh, the defendant avowed in his own right, and made cognizance as the bailiff of *Edward Shepherd*, *Henry Shepherd*, and *Frances Eliza Mangles Shepherd*, and well acknowledged the taking, because he said that the said *John Brenchley*, *William Henry Stacey*, *Courtney Stacey*, and *John Wise*, held the premises as tenants thereof to the defendant and the said *Edward*, *Henry*, and *Frances Eliza Mangles Shepherd*, at the yearly rent of 16*l.* and that that sum for one year's rent, on the said 11th *October*, 1819, was due and in arrear to them. The plaintiff by his plea in bar to the fifth avowry, traversed the demise *modo et formá*. He pleaded a similar plea in bar to the seventh avowry, and denied that the defendant was the bailiff of the said *Edward*, *Henry*, and *Frances Eliza Mangles Shepherd*, in manner and form as he had alleged in that cognizance.

The issues joined in these pleadings, were tried before Lord Chief Justice *Abbott*, at the last Assizes at *Maidstone*, when a verdict was found for the defendant, and that the sum of 16*l.* one year's rent, was due at the time of making the distress complained of, subject to the opinion of the Court, upon the following case :

The house and premises in respect of which the rent in question was payable, are situate in the county of *Kent*, and are of gavelkind tenure, and subject to all the customs and usages of tenements of that description. In *January*, 1819, one *Mary Shepherd* died, sole seized of the premises in question, and upon her death the same descended to the defendant and *Edward Shepherd*, *Henry Shepherd*, and *Frances Eliza Mangles Shepherd*, as co-heirs in gavelkind. In the life-



time of the said *Mary Shepherd*, *John Brenchley*, *William Henry Stacey*, *Courtney Stacey*, and *John Wise*, held the premises as tenants thereof to her, at the yearly rent of 16*l.* payable on the 11th of *October*, in each year, and such tenancy continued at the time the defendant distrained the plaintiff's goods, and 16*l.* for one year's rent, was due at the time of such distress. The defendant was not authorised by *Henry Shepherd* to make any distress for his proportion of the rent in arrear, nor to make the distress in question, but was authorised by the other co-heirs.

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The question for the opinion of the Court was, whether under these pleadings, the defendant, as being only one of the several claimants who were co-heirs in gavelkind, could, without the authority of the said *Henry Shepherd*, distrain for the whole or any part of the said rent in arrear. If the Court should be of opinion that the defendant was justified in so distraining, then the verdict was to stand for so much of the rent in arrear as they should decide that the said distress was legally made for, if not, a verdict was to be entered for the plaintiff for 4*l.* 4*s.* damages and costs.

The case came on for argument on a former day in this Term, when

Mr. Serjt. *Blosset*, for the plaintiff, submitted, that all the avowries and cognizances were bad. By the fifth, it is stated, that *Brenchley* and others, held one undivided fourth part of the premises as tenants to the defendant, and that the rent was due to him, but it must be considered as a tenancy of the four co-heirs, viz. the defendant, *Edward*, *Henry*, and *Frances Eliza Mangles Shepherd*, and a holding under them, as forming but one heir. The only material question arises on the seventh avowry and cognizance—by which the defendant avowed in his own right, and made cognizance as the bailiff of the three *Shepherds*, alleging that *Brenchley* and others held as tenants to the four. Whether the defendant

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acted as bailiff by their command or not, is traversable, and it is found as a fact in the case, that he had no authority from one of them to distrain for him. In order to sustain such cognizance, it must appear either on the face of the record, or in the case, that he had the authority of the three, but as it embraced a question of law, whether such authority was necessary or not, it should have been raised on demurrer. There is a great distinction between the rights of copartners and joint-tenants, as well in the case of a distress for rent as in other respects, and although one joint-tenant may distrain for the whole, and avow for it without shewing any authority from the others, still, a coparcener can have no such right. There is no authority expressly in point, and the question must therefore be determined on principle. It is therefore necessary to consider, in the first place, whether the same law applies to coparceners or co-heirs in gavelkind (*a*), as to joint-tenants in the case of a distress for rent. In the *Year Book* (*b*) it is said, that "if two men have a joint rent, and the rent being in arrear, one distrain, and the tenant bring replevin, he ought to make avowry and cognizance as bailiff of his companion; and because he has an interest in the rent, his being bailiff is not traversable." That, however, applies to joint-tenants, and not to coparceners. So, in *Pullen v. Palmer* (*c*), it was held, that if joint-tenants distrain, and the goods be replevied, they must sever in avowry, or the avowant must avow in his own right, and make conusance as bailiff to the rest; but Lord Holt there took the distinction (*d*), and observed, that "all the entries were, that joint-tenants do join, not as bailiff to the rest, but as joint-tenants; and he avows the taking of the rent as in lands liable to the distress of him and the rest." That, however, does not apply to the rights of co-

(*a*) In Littleton, sec. 265, it is said, that parceners by custom, are where all the sons take the lands and tenements equally between them by descent, as by the custom of gavelkind.——(*b*) 15 Hen. 7. fol. 17. pl. 11.——(*c*) 5 Mod. 72. S. C. Id. 151. Carth. 328.——(*d*) 5 Mod. 72.

parceners. So, in *Bracton* (a), it appears that a joint-tenant has an entirety in the whole estate, for it is there said "*Si hæreditas non fuerit partita sed teneatur in communi, quilibet cohæredum tantundem juris habet tenendi hæreditatem quantum et alii: sed tamen non per se ante divisionem sed pro se in communi cum aliis, et sic totum tenet et nihil tenet, scilicet, totum in communi et nihil separatim per se.*" A joint-tenant, therefore, may distrain for the whole, because he has an unity of interest in the whole, which a coparcener has not. The distinction as to the different properties of parceners and joint-tenants, was most ably made by Mr. Justice *Blackstone* (b), for though the former have an unity, they have not an entirety of interest: they are properly entitled each to the whole of a distinct moiety; and there is no survivorship between them: for each part descends severally to their respective heirs, though the unity of possession continues. So, in *Coke Littleton* (c), it is stated, that though parceners, in respect of their ancestor, make but one heir; and before partition have one entire freehold in the land, so long as it remains undivided in respect of any stranger's *precipe*, yet to many purposes among themselves, they have in judgment of law, several freeholds; for each parcener, where there are two, has really but a title to a moiety of the land, and is not, as in case of joint-tenancy, seised *per my et per tout*. The same law holds, where there are more parceners, for in such case, each has but a title in judgment of law to a proportion; therefore, parceners may enfeoff each other of their share, as well as convey it to strangers. So, if one die, her part shall descend to her heir, there being no benefit of survivorship as with joint-tenants. So, as between co-heirs, there is a difference between an action possessory and an action droiturel; for though the possessory action be joint, because it follows the nature of the possession, which was joint, yet the droiturel action must be se-

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(a) Lib. 5. tract. 5. cap. 26. fol. 430. — (b) 2 Bla. Com. 188. —
 (c) 164 a. See also Bac. Abr. vol. i. tit. Coparceners, B.

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veral, where the right descending was several—as if two coparceners be disseised, and each dies, having issue, each of their issue must have several *præcipes*, because in their droiturel action, each of them counts on the several right descending from their several ancestor, and not from the joint possession their ancestor enjoyed. In *Roe, d. Langdon v. Rowleston* (a), it was held, that the disability of one parcener at the time of descent, would not prevent the statute of limitations from operating on the interest of her coparcener:—that could not be so, if the interest was entire. So, in the case of tenants in common, the title of one may be lost, although the title of the other be protected. Mere unity of possession cannot entitle one parcener to distrain for his coparcener, any more than one tenant in common for another. Here, it is found, that the defendant was not authorised by *Henry Shepherd* to distrain for him. Such an authority was, at all events, necessary to have been proved, as it was traversed by the plaintiff in his plea in bar to the seventh avowry and cognizance; for it would have been a great hardship if one parcener could distrain without the knowledge or sanction of his coparcener, for the statute of limitations might operate before they came to an account, in which case, the latter would be deprived of all remedy whatever.

Mr. Serjt. *Taddy, contra*.—The only question is, whether any material distinction can be taken between the rights of coparceners and joint-tenants in a possessory action, and whether the former have an implied authority to distrain for the whole rent, without shewing any express order from his coparceners so to do. That distinction turns on the rights and interests of parceners in real and possessory actions, for in the latter, they must by law be considered as standing in the same situation as joint-tenants. In *Black-*

(a) 2 Taunt. 441.

*stoue's Commentaries* (a), it is said, that "if one of two or more coparceners deforces the other, by usurping the sole possession, the party aggrieved shall have a writ of right, *de rationabili parte*; which may be grounded on the seisin of the ancestor at any time during his life; whereas, in a *nuper obiit*, (which is a possessory remedy) he must be seised at the time of his death." The same distinction was adverted to in *Coke Littleton* (b), *Bacon's Abridgment* (c), and *Brooke's Abridgment* (d). The *dictum* from the *Year Book* (e) is thus cited in *Viner's Abridgment* (f), "If there are two coparceners of a rent, and the one distrain and avow for himself, and justifies as bailiff of his companion, it is not traversable that he is not bailiff." And *Brooke's Abridgment* (g) is relied on in support of that position, where it is laid down in these very express words. In *Stedman v. Bates* (h) it was determined, that coparceners must join in an avowry; and in the same report of that case in *Carthens* (i), it is expressly said, that "where one sister (as coparcener) distrains, she must avow in her own right, and also as bailiff of her sister, for the entire rent, and not for a moiety only in her own right." The same case is reported in *5 Modern* (k), where it is stated that judgment was given for the plaintiff on demurrer, because one coparcener could not make cognizance for a moiety of the rent before partition, although the coparceners had several inheritances. With respect to the making a distress, therefore, a coparcener must be considered as standing in the same situation as a joint-tenant. In *Right, d. Fisher v. Cuthell* (l), Lord *Ellenborough* observed (m), that "the rule of law, as laid down in *Rud v. Tucker* (n), with respect to joint-tenants, was this, that every act done by one joint-tenant for the

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(a) Vol. iii. page 194. — (b) 164 a. — (c) Tit. Coparceners, B. (d) Tit. Joinder in Action, 43. — (e) 15 Hen. 7. pl. 17. fol. 17. — (f) Tit. Bailiff, D. pl. 4. — (g) Tit. Traverse, pl. 118. — (h) 1 Ld. Raym. 64. — (i) Page 364, *nomine Page v. Stedman*. — (k) Page 141, *nomine Stedman v. Page*. S. C. 1 Salk. 390. — (l) 5 East, 491. — (m) Id. 494. — (n) Cro. Eliz. 802.

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ceners has a sufficient authority in law by reason of his interest in the rent, to make cognizance as bailiff of his coparceners, without any actual authority given by them? No decided case has been cited as to this point, but a *dictum* in the *Year Book* (a) has been relied on, where it was said, that "if two men have a joint rent, and the rent being in arrear, one distrain, and the tenant bring replevin, he ought to make avowry and cognizance as bailiff of his companion; and because he has an interest in the rent, his being bailiff is not traversable." It has been submitted for the plaintiff, that this *dictum* applies to joint-tenants rather than to coparceners, but it is to be remarked, that Lord Chief Justice *Brooke*, in his Abridgment (b), cites it as applying to parceners, and it appears to us to be equally applicable to both, for both have a joint rent, there being in both cases but one rent, and each parcener, as well as each joint-tenant, is interested in that joint rent. In this view of the subject, the case of *Pullen v. Palmer* (c), which was a case of joint-tenants, becomes a considerable authority, where it was held, that one joint-tenant cannot avow for the whole rent;—but it was there laid down by Lord Chief Justice *Holt*, that "he may distrain for the whole, but must avow in his own right and as bailiff to the rest, and that he may distrain for the whole in point of interest, and needs no authority from the rest to distrain, but may do it by law." The *dictum* in *Page v. Stedman* (d), must be understood in the same sense, viz. that "when one parcener distrains, she must avow in her own right, and also as bailiff to her sister, for the entire rent,"—namely, that she may do so without any express authority from her sister. It is unnecessary to decide whether the authority which the law gives to each joint-tenant and parcener in point of interest, to distrain and avow for himself and the rest, is such an authority as the other could not countermand, if they thought proper so to do. It is suffi-

(a) 15 Hen. 7. pl. 7. fol. 17. — (b) Tit. Traverse, pl. 118. —
 (c) 5 Mod. 72. — (d) Carth. 364.

cient that no such countermand appears here, nor is there any express dissent found as a fact in the case, but only an absence of express authority. This, however, we think immaterial, inasmuch as the law gives the necessary authority, which is sufficient to support the allegation contained in the seventh avowry and cognizance, that the defendant was bailiff of his three copartners, and that the rent was due to them. The rent when recovered, will, of course, be received by the defendant for the equal use and benefit of his three coparceners, as well as of himself. We are therefore of opinion, that the verdict found for the defendant for 16*l.*, being one year's rent due from the plaintiff at the time of making the distress must stand, and consequently, that there must be

Judgment for the avowant.

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NICHOLL v. BROMLEY.

Monday,
Feb. 12.

MR. Serjt. *Onslow* on a former day in this Term, had obtained a rule *nisi*, that the judgment which had been entered up on the warrant of attorney which had been given in this cause, and the execution issued thereon, might be set aside, on an affidavit which stated that the terms of the defeasance were, that "the warrant of attorney was given by the defendant to secure the payment of 1000*l.* on demand, and that in case default should be made, then judgment might be entered up thereon, and execution issue for that sum, or so much thereof as should be then due, together with all costs."

That a partnership was contemplated between the plaintiff and defendant—that the consideration-money was advanced by

Where the defeasance on a warrant of attorney stated that it was given to secure the payment of a sum on demand, and that in case default should be made, judgment was to be entered up, and execution issue: Held, that an actual demand must be made before the issuing of execution thereon; and a proposal to the defendant to settle amicably, does not amount to such a demand.

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the former after the execution of the instrument, and that some differences afterwards arose between them—that the plaintiff's attorney called on the defendant to induce him to come to an amicable arrangement, but not having succeeded, execution was sued out against him by the plaintiff on the following day—and that no demand of the sum secured by the warrant of attorney, had been made before the execution issued.

Mr. Serjt. *Vaughan* now shewed cause, and submitted, that the words "payment on demand" were merely introduced for the purpose of form, as in a bond. That the suing out execution was of itself a sufficient demand, or that at all events, as the defendant had refused to come to any arrangement with the plaintiff the day before the execution issued, it was equivalent to a demand, as his attorney waited on him expressly for the purpose of coming to a settlement.

Mr. Serjt. *Onslow* in support of the rule, relied on the case of *Winter v. Mauseley* (a), where a bond was conditioned for the payment of a sum to the executors of the obligor, and of the interest during his life, payable on certain days, or *within twenty days after demand*, and the obligee became bankrupt, and interest was then due, but no demand had been made ;—it was held that there was no forfeiture of the bond, and therefore that it did not constitute a debt proveable under the commission. So, here, the defeasance expressed that the warrant of attorney was given to secure the payment of a certain sum of money on demand, and it was incumbent on the plaintiff to make such demand on the defendant previously to his suing out the execution against him.

The Court were clearly of opinion, that by the terms of the defeasance, default could not be made until after demand.

(a) 2 Barn. & Ald. 802.



That it was the intention of the parties that an actual demand should be made, which did not appear to have been done, and they therefore ordered the rule to be made

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NICHOLL  
v.  
BROMLEY

Absolute.

BROWN v. BOYN.

Monday,  
Feb. 12.

MR. Serjt. *Vaughan* on a former day in this Term, had obtained a rule *nisi* that the Prothonotary might review his taxation of costs in this cause, on an affidavit which stated that the defendant had obtained a verdict, and that the Court granted a new trial on the ground that it was against evidence, and directed that the costs of the former trial should abide the event of the new trial. That on the second trial, the verdict was for the plaintiff, and that the Prothonotary, on taxation, had allowed the costs of both trials for him. The learned Serjeant contended, that he was only entitled to the costs of the second trial, and relied on the case of *Chapman v. Partridge (a)*, as being precisely in point.

Where the defendant had obtained a verdict, and the Court granted a new trial, on the ground that it was against evidence, and directed the costs of the former trial to abide the event of the second, and on that trial the plaintiff had a verdict: Held, that he was only entitled to the costs of such second trial.

Mr. Serjt. *Taddy* now shewed cause, and submitted, that as the costs of the former trial were to abide the event of the second, in which the plaintiff had obtained a verdict, he was entitled to the costs of both. If not, the introduction of those terms in the rule, would have no effect whatever, as it would leave the parties precisely on the same grounds as they stood before, and the effect of having a new trial would be no indulgence to the party to whom it was granted, unless he was entitled to the costs of the former trial, in the event of his succeeding in the second.

(a) 2 New Rep. 382.

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BROWN  
v.  
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Mr. Serjt. *Vaughan*, in support of the rule, cited *Chapman v. Partridge*, and *Goodtitle, d. Bremridge v. Walter (a)*, where it was decided, that although a defendant succeeded upon the first trial by a forgery, and the plaintiff obtained a verdict on the second, he was not entitled to the costs of both.

The Court observed, that if a verdict be given against evidence, it can only be disturbed on the payment of costs. If the same party succeeds on both trials, he is entitled to the costs of both, but this case is not distinguishable from that of *Chapman v. Partridge*, except that there the plaintiff obtained a verdict on the first trial, and the defendant on the second. The rule, therefore, must be made

Absolute.

(a) 4 Taunt. 671.

#### REGULA GENERALIS.

*Hilary Term, 1821.*

WHEREAS, by the common consent rule in actions of ejectment, the defendant is required to confess lease, entry, and ouster, and insist upon his title only: and whereas, in many instances of late years, the defendant in ejectment has put the plaintiff, after the title of the lessor of the plaintiff has been established, to give evidence that such defendant was in possession (at the time the ejectment was brought) of the premises mentioned in the ejectment, and for want of such proof, has caused such plaintiff to be nonsuited: and whereas such practice is contrary to the true intent and meaning of such consent rule, and of the provisions therein contained for the defendant's insisting upon the title only: it

is therefore ordered, that from henceforth in every action of ejectment, the defendant shall specify in the consent rule, for what premises he intends to defend, and shall consent in such rule to confess upon the trial, that the defendant (if he defends as tenant, or in case he defends as landlord, that his tenant) was, at the time of the service of the declaration, in the possession of such premises; and that if upon the trial, the defendant shall not confess such possession, as well as lease, entry, and ouster, whereby the plaintiff shall not be able further to prosecute his suit against the said defendant, then no costs shall be allowed for not further prosecuting the same, but the said defendant shall pay costs to the plaintiff in that case to be taxed.

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REGULA  
GENERALIS.

R. DALLAS.

J. A. PARK.

J. BURROUGH.

J. RICHARDSON.

END OF HILARY TERM.



**C A S E S**  
 ARGUED AND DETERMINED  
 IN THE  
**Courts of Common Pleas**  
 AND  
**Exchequer Chamber,**  
 IN EASTER TERM,  
 IN THE SECOND YEAR OF THE REIGN OF  
 GEORGE IV.

LAZARUS and Another, Assignees of JACKSON, a Bank-  
 rupt v. WAITHMAN and Another, Sheriffs of London.

1821.

Thursday,  
 May 10.

THIS was an action of trover, brought by the assignees of Jackson, a bankrupt, against the defendants as sheriffs of London, for taking and selling the bankrupt's goods, under an execution which had issued against him at the suit of one Thwaites.

At the trial of the cause, before Lord Chief Justice Dallas, at Guildhall, at the Sittings after the last Term, in order to establish an act of bankruptcy, by a beginning to keep house, the servant of the bankrupt was called, who

Where a trader ordered his servant to say, that if any creditors called, he was not at home, and he was accordingly denied, but was in bed ill at the time :—Held, that it was properly left to the Jury, whether this was a be-

ginning to keep house, with an intent to commit an act of bankruptcy, and that they were warranted in finding that it did.

Where a trader committed an act of bankruptcy on the 9th November, and the sheriff took his goods in execution on the 15th, and sold them on the 21st December, and a commission was issued on the 23d, and an assignment made on the 6th January following :—Held, that the assignees might maintain trover against the sheriff, although he had sold before the assignment was made, as the bankrupt's property vested in them by such assignment, from the act of bankruptcy, by relation.

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 LAZARUS
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swore, that in the latter part of the month of *October*, 1820, he told her to say, if any creditor called, that he was not at home;—that a creditor afterwards called, and she informed him that her master was out, but he was in bed ill;—that a short time after, another called, when she again denied his being at home, though he was then in the house. A medical man stated, that he had attended the bankrupt about this time, and that he was incapable, through illness, of transacting business with his creditors. It was then attempted to set up an act of bankruptcy, by keeping house on the 6th and 9th *November*, when no explanation was given as to the state of his health; and it was proved, that a washerwoman, who washed for the family, inquired for him, and that he ordered himself to be denied to her; but it did not appear that she was a creditor (a). It was also proved, that the execution was taken out and executed on the 15th *November*, 1820; that the bankrupt's goods were sold under it on the 21st *December*; that a commission was issued two days afterwards; and that an assignment was made to the plaintiffs on the 6th of *January* last. His Lordship left it to the Jury to say, whether there was sufficient evidence to establish an act of bankruptcy, by a beginning to keep house, and was of opinion that the property of the bankrupt vested in the plaintiffs, as his assignees, from the time of such act. The Jury found, that the acts done by the bankrupt, in ordering himself to be denied to his creditors, amounted to an act of bankruptcy, and accordingly gave a verdict for the plaintiffs.

Mr. Serjt. *Cross* now applied for a rule *nisi*, that it might be set aside, and a nonsuit entered,—or a new trial granted; and in support of the latter, submitted, that no act of bankruptcy had in fact been proved, as the bankrupt was ill at the time, and incapable of transacting business with his creditors.—[Lord Chief Justice *Dallas*. He merely ordered

(a) See *Lloyd v. Heathcote*, ante, page 129.

himself to be denied to his creditors, and not to every description of persons who might call on him.]—At all events, this action cannot be maintained, as the assignment was not made to the plaintiffs until *after* the sale by the defendants under the execution, and the latter cannot be made wrongdoers by relation to the act of bankruptcy. Although, in *Cooper v. Chitty* (a), it was held, that the property of a bankrupt is vested in his assignees by the assignment, from the act of bankruptcy, by relation, still, there, the sale was made long subsequently to the assignment; and Lord Mansfield, in delivering the judgment of the Court, observed (b), that “the injury complained of in that action, for which damages were to be recovered, was not the seizure, but the wrongful conversion; that the assignment was made on the 8th of *December*, and the sale did not take place till the 28th, being twenty days after the assignment.” In *Bayly v. Bunning* (c), where trover was brought against an officer for taking the goods of a third person under an execution, against whom a commission of bankrupt was afterwards sued out, and the goods were assigned to the plaintiff, it was held that the action was not maintainable, as the officer was obliged to execute the writ, and could not know the act of bankruptcy, or that a commission would be sued out, and the sheriff was held not to be liable, although he had notice of the assignment; and, in *Philips v. Thompson* (d), the Court said, that “the case of *Bayly v. Bunning* was resolved only in excuse of the bailiff that he should be excused for executing the writ, and not that the goods were bound by the delivery of the writ,” and therefore, that the officer should not be made a trespasser by relation. So, here, though the goods were not bound by the issuing of the execution, still, as the sale was completed before the assignment to the plaintiffs, they cannot recover in this action. In *Cary v. Crisp* (e), it was held, that until an assign-

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(a) 1 Burr. 20.—(b) Id. 33.—(c) 1 Lev. 173.—(d) 3 Lev. 192. S. C. Id. 69.—(e) 1 Salk. 108.

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ment, the property of the goods is not transferred out of the bankrupt; and that case was recognised by Lord *Hardwicke*, in *Brassey v. Dawson* (a), where his Lordship said, that “the property of a bankrupt remains in him, and is not in abeyance until assignment.” *Smith v. Milles* (b), is confirmatory of *Cooper v. Chitty*, and there the assignment was made subsequently to the sale. Although a distinction has been drawn between the actions of trespass and trover, the latter cannot be maintained if the assignment be made after the sale under the execution. Relation is but a fiction of law, and will not make a sheriff a wrong-doer by seizing and selling the goods of a bankrupt, previously to the assignment of his property to the assignees.

Lord Chief Justice DALLAS.—These objections were raised at the trial. I then thought they were not entitled to any weight, but said they might be mentioned to the Court; and having now heard the additional reasons urged in their support, I continue of the same opinion. This is not an action of trespass, but of trover, and the true ground of distinction between those two actions was most fully and clearly laid down by Lord *Mansfield*, in the case of *Cooper v. Chitty*, where all the previous authorities on this question are collected, and it was there held, that the property of a bankrupt's goods is vested in his assignees by the assignment, from the act of bankruptcy, by relation. His Lordship there said (c), that “the action of trover was maintainable, because the conversion, and not the taking, was the gist of the action;—that it was manifest that the conversion was wrongful, as the property was in the assignees from the time the act of bankruptcy was committed, by relation;—that the defendants, as sheriffs, had no authority to sell the goods of the assignees, but of the bankrupt only, and that they ought to have delivered the goods in question to the plaintiffs,

(a) 2 Str. 981.——(b) 1 Term Rep. 475.——(c) See 1 Burr. 31. 33.



as being such assignees ;—that the sheriff acts at his peril, and is answerable for any mistake ;—and that infinite inconvenience would arise if it were not so.” That distinction was recognised and adopted by the Court of *King’s Bench*, in the subsequent case of *Smith v. Milles* (a). On this ground, therefore, I see no reason to disturb the verdict. As to the act of bankruptcy, I left it as a question for the Jury, and I think it would be too much to say that they have come to a wrong conclusion. The bankrupt only ordered himself to be denied to any creditors that might call, and not to every description of persons. He should have directed his servant to have said that he was ill in bed, if the fact was so ; but he ordered her to say, that he was not at home, although it was proved that he was ; and the only excuse offered was, that he was too ill to transact business with his creditors. With respect to the denial to the washerwoman, it was purely a question of fact for the Jury. I therefore am clearly of opinion, that there is no foundation for the granting this rule, on either of the objections which have been now raised.

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Mr. Justice PARK.—This motion has been made on two distinct grounds. With respect to the act of bankruptcy, I entertain no doubt whatever. It was most properly left to the Jury by my Lord Chief Justice. Was there a beginning by the bankrupt to keep house ? He might have been ill, but he ordered his servant, if any creditor called, to say that he was not at home. It does not appear that he was so ill as to be unable to see any one, as his order was confined to a denial to his creditors alone. That is, I think, sufficient evidence of an intention to delay, and that the Jury were well warranted in drawing the conclusion they have done. As to the other objection, it appears to me to be equally untenable, unless the Court were to overturn the decision in *Cooper v. Chitty*, and all other cases which have

(a) See 1 Term Rep. 481.

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been governed by it, to the present time. The conversion, and not the seizure, is the gist of the action; for the latter was merely a preliminary step to the sale. The defendants might have come to the Court, or required an indemnity, instead of which, they have proceeded to a sale under the execution, which was not issued until long after the act of bankruptcy had been committed.

Mr. Justice BURROUGH.—This point was settled long before I knew *Westminster Hall*. The sheriff acts at his peril, and great inconvenience would arise if it were not so. Here, the defendants had a remedy, if they had thought proper to have applied for it; and by the policy of the bankrupt laws, the property of a bankrupt vests in his assignees, by the assignment, from the time the act of bankruptcy was committed. As to the act of bankruptcy, it was a mere question for the Jury, and, according to the evidence adduced at the trial, I think there is no ground to say that they have come to a wrong conclusion.

Mr. Justice RICHARDSON.—I am also of opinion, that the question as to the act of bankruptcy was properly left to the Jury, and that they have rightly disposed of it. If the bankrupt had been confined to his bed by illness, it would not have amounted to such an act, but he limited his order of denial to his creditors alone. The Jury might therefore conclude, that his illness was founded in pretence. It has, however, been further insisted, that this action is not maintainable, because the defendants had sold the goods which they had seized under the execution, before the assignment was made to the plaintiffs. But the law as to a question of this nature, has been long since settled, and has frequently occurred of late years at *Nisi Prius*, and if a sheriff takes the bankrupt's goods in execution, after an act of bankruptcy, and before the commission, but sells them after it is issued, the assignees may bring an action of trover against

him. In the case of *Lyon v. Lamb* (a), the sheriff sold under an execution, before he had any intimation that an act of bankruptcy had been committed, and it was insisted, that that circumstance distinguished it from *Cooper v. Chitty*; but the Court of *Exchequer* held, that the property was changed, and vested in the assignees, by relation, from the time that act was committed. So here, though the defendants might not have known that a commission was about to issue at the time of the seizure, it forms no excuse for them for having afterwards proceeded to a sale.

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Rule refused.

(a) This case is reported as to the construction of a guarantie, *Fell on Guaranties*, 2d edit. Appendix, p. 260.

### MORRIS v. DAUBIGNY.

Friday,  
May 11.

THIS was an action of trespass, for breaking and entering a close in the possession of the plaintiff, and converting his soil. Plea, Not Guilty.

At the trial of the cause before Mr. Justice *Burrough*, at the last Assizes at *Salisbury*, it appeared that the defendant was the owner of some pleasure grounds which adjoined the close in question, and that he had caused a trench to be enlarged, in order to drain them. To prove the trespass, the labourer who dug the trench was called, when it was objected for the defendant, that his testimony could not be received, as he had not been previously released by the plaintiff, on the ground that he was interested in the event of the suit, as in case the plaintiff should fail, the verdict might be used in evidence in an action to be brought by

In trespass, a person who commits the trespass but is not sued, is a competent witness for the plaintiff, against his co-trespasser, without being released by the plaintiff.

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him against the witness, who actually committed the trespass. The learned Judge over-ruled the objection; the witness was then examined, and proved the trespass, and the Jury accordingly found a verdict for the plaintiff; but leave was given the defendant to move to set it aside, if the Court should be of opinion that such objection was well founded.

Mr. Serjt. *Pell* now moved accordingly, and submitted, that as the trespass was committed by the witness, he could only relieve himself from an action at the suit of the plaintiff, by shewing that he acted as the servant of the defendant, and not on his own account,—and that if the plaintiff obtained satisfaction from the defendant, it would exclude him from his right to recover against such witness, as he might avail himself of the verdict, and never be subject to an action for the trespass.

But the Court held, that there was no ground whatever for the application. That it had been long established, that in an action of trespass, a joint trespasser who is not sued, is a competent witness for the plaintiff, against his co-trespasser, although left out of the declaration for that purpose<sup>(a)</sup>. The plaintiff has elected to bring his action against the real principal, instead of a mere pauper, and he cannot afterwards sue the latter, as the verdict in this action could neither be used nor given in evidence for or against him.

Rule refused.

(a) See *Chapman v. Graves*, 2 Campb. 333, n. Phillips on Evidence, 5th edit. vol. i. page 41.

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## SHEE v. ABBOTT.

Saturday,  
May 12.

MR. Serjt. *Pell* applied for a rule, calling on the defendant to shew cause why the rule for allowance of bail in this case should not be discharged, on an affidavit, stating that one of the bail came up in the course of the last Term, viz. on the 5th *February*, to justify for his brother, and on being asked whether he was a housekeeper, he swore that he was, and had been in the occupation of the house in which he then resided, from the *Christmas* preceding, and that he held it under an agreement from his brother, who was the landlord: that he was then permitted to justify; but that five days before, a commission of bankrupt having been taken out against his brother, he swore that he resided with the latter in the same house, and that he, and not the bail, was the occupier thereof. The learned Serjeant referred to the case of *Gould v. Berry* (a), where the justification of bail was set aside, one of the bail having falsely sworn as to the solvency of his circumstances, and the other, at the time he came up to justify, having improperly personated the inhabitant of the house, to which reference was given in the notice of justification.

This Court will not discharge the rule for allowance of bail, on account of perjury in one of them, who had sworn on his justification, that he was a housekeeper, and a few days before, that he was not:—  
The plaintiff's only remedy is by indictment.

But the Court held, that the plaintiff's only remedy was by indicting the bail for perjury. That the case of *Gould v. Berry* was distinguishable from the present, as it appeared that one of the bail there had been since rejected in another cause, in which he had come up to justify, and it was on that representation alone, that the rule for setting aside the justification was granted. There, too, one of the bail had merely sworn as to the solvency of his circumstances, and the other had improperly personated another person.

(a) 1 Chit. Rep. 143.

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Here, however, the bail swore that he was a housekeeper at the time he came up to justify, and it now turns out, that a few days before, he had sworn the contrary. That, therefore, will clearly subject him to an indictment for perjury.

Rule refused (a).

(a) In *A'Becket v.* — (a), this Court held, that if bail have sworn to a false account of their property, the plaintiff has no other remedy than by indictment for perjury. But in *Brown v. Gillies* (b), the rule for allowance of bail was discharged with costs, to be paid by the defendants, on an affidavit, that one of the bail had perjured himself on his justification, in swearing that an action in which he had been bail, had been compromised (c).

(a) 5 Taunt. 776. — (b) 1 Chit. Rep. 372. — (c) See also S. C. Id. 496.

SMITH v. WILTSHIRE and four others.

Monday,  
 May 14.

Where constables were directed under a warrant to search for and take black cloth, supposed to have been stolen, and they took cloths of a different description and colour, and carried them before a magistrate, refusing, at the time they took them, to inform the owner whether they acted under a warrant or

not: Held, that they were within the protection of the statute 24 Geo. 2. c. 44. s. 8, and therefore that an action against them ought to have been commenced within six calendar months from the time of such taking, and it seems that that section applies to all cases of constables acting as such.

THIS was an action of trespass. The first count of the declaration stated, that the defendants broke and entered the plaintiff's dwelling-house and took his goods, in consequence of which, persons who had been in the habit of dealing with him, afterwards declined to do so. The second count was similar to the first, omitting the special damage. The third was for breaking and entering the house and removing the goods, and the fourth was for seizing and taking the goods generally.

At the trial of the cause before Mr. Justice *Burrough*, at the last assizes at *Taunton*, it appeared that the defendants, two of whom were constables, the third a tithing-man, and the two others acting in their aid, went to the house of the plaintiff, a clothier, when he was not at home:

that they were asked whether they had a warrant, to which they gave no answer, nor did they produce one—that on their taking two pieces of white cloth, they were told, that the persons who picked the wool and spun them, would prove them to be the property of the plaintiff, on which one of the defendants said, that he would take them whether right or wrong—that they afterwards went into the upper part of the house, broke open a closet and took blue and other cloths, which, together with the two other pieces of white cloth, they carried before a Magistrate—that the latter were afterwards returned, but the blue was not.—At the trial, the defendants produced a warrant of a Magistrate, directing them to search the plaintiff's house, for the purpose of ascertaining whether some black kerseymere cloth, which had been stolen, was concealed there. No cloth, however, of that sort was found, but the defendants took away those of another description, as above stated. It further appeared, that the seizure was made on the 27th *October*, 1819, and the action was not commenced until the beginning of the month of *May* following, when it was insisted for the defendants, that it could not be maintained, as they were protected by the statute 24 *Geo. 2. c. 44. s. 8 (a)*, and the learned Judge, being of that opinion, (as they acted as constables under the warrant,) directed a verdict to be found for them, which was accordingly done.

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(a) By that section it is enacted, "that no action shall be brought against any Justice of the Peace for any thing done in the execution of his office; or against any constable, headborough, or other officer or person acting as aforesaid, unless commenced within six calendar months after the act committed:"—and by the sixth section of that statute it is provided, "that no action shall be brought against any Justice, constable, headborough, or other officer, or against any person or persons acting by his order and in his aid, for any thing done in obedience to any warrant under the hand or seal of any Justice of the Peace, until demand hath been made of the perusal or copy of the warrant, &c. and it then directs, that if any action shall afterwards be brought against such constable, without making the Justice a defendant, the constable, upon producing the warrant at the trial, shall be entitled to a verdict, notwithstanding the defect of jurisdiction in such Justice."

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Mr. Serjt. *Pell*, on a former day in this Term, applied for a rule *nisi*, that this verdict might be set aside and a new trial granted, on the ground of a misdirection; as the defendants were only authorised by the warrant to take black kerseymere cloth, and as they found none, but took others of a different description, they were not acting in obedience to that warrant as constables, as they had exceeded the authority thereby delegated to them by the Magistrate, and must therefore be considered as wholly unauthorised to make the seizure in question. The case of *Price v. Messenger* (a) is precisely in point, where the warrant directed the defendants, as constables, to search for stolen sugar, supposed to be concealed in the plaintiff's house, which they took, together with tea and nails; and Lord Chief Justice *Ellenborough* there observed (b), that "if they executed it in the only way in which it was capable of being executed, namely, by making it attach on all goods which fell within the description contained in it, they acted in obedience to it: and having done so, were entitled to avail themselves of the protection of the statute;" and Mr. Justice *Heath* said, that "when the defendants seized the teas, they were not acting in obedience to the warrant." So, here, the defendants exceeded their authority, by seizing the cloths in question, as the warrant was confined to black cloth of a particular description. In *Money v. Leach* (c), Lord *Mansfield* held, that a defendant, as an officer, under the statute 24 Geo. 2. c. 44, must shew that he had acted in obedience to the warrant. In *Milton v. Green* (d), Lord *Ellenborough* said, that "the defendants had not acted in obedience to the warrant, without which, they were not within the protection of the statute." In the subsequent case of *Bell v. Oakley*, his Lordship observed (e), that "the defendants, so far from shewing that they acted in obedience to the warrant, commenced by an unauthorised course of proceeding, and that it was a trespass in them *ab initio*;" and

(a) 2 Bos. & Pul. 158.——(b) Id. 162.——(c) 3 Burr. 1768.——  
 (d) 5 East, 238.——(e) 2 Maul. & Selw. 261.



Mr. Justice *Bayley* there remarked, that “ in *Price v. Messenger*, the defendant, so far as he acted in obedience to the warrant, was under the protection of the statute, but he was holden liable for the seizure, which was not made in obedience to the warrant.” That is precisely applicable to the present case. [Lord Chief Justice *Dallas*.—In *Bell v. Oakley*, the defendants acted under a warrant of distress to levy a poor’s rate, and the Court held, that they might be sued in trespass without a demand of the warrant, as required by 24 Geo. 2. c. 44, as they were not authorised under it in breaking and entering the house. So, in *Theobald v. Crichmore* (a), where a constable broke open the door of the plaintiff’s house, under a Magistrate’s warrant of distress, to levy a church-rate under the 53 Geo. 3. c. 127, Lord *Ellenborough* said (b), that “ it was perfectly clear, that the defendant had no right to break the outer door for the purpose of executing his warrant of distress. That the question then was, whether he could be said to have acted in pursuance of the statute, within the meaning of that term, as there used; that if it meant only acts lawfully done under the authority of the statute, he would not be protected. But the object was clearly to protect persons acting illegally, but in supposed pursuance, and with a *bonâ fide* intention of discharging their duty under the act of parliament.”] The only difficulty is, whether those former decisions have been broken in upon by the late case of *Parton v. Williams* (c), where it was held, that a constable acting under a warrant, commanding him to take the goods of *A.*, took the goods of *B.* by mistake, conceiving them to belong to *A.* he was entitled to the protection of the statute 24 Geo. 2. c. 44. s. 8, and that an action must be brought against him within six calendar months. There, Mr. Justice *Bayley* was of opinion (d), that “ when a constable is acting *bonâ fide*, and with an honest opinion

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(a) 1 Barn. & Ald. 227.——(b) Id. 229.——(c) 3 Barn. & Ald. 330.  
d) Id. 335.

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that he is discharging his duty, and that he is acting at the very time in obedience to the warrant of a Magistrate, he was entitled to the protection of that section." Here, however, though the defendants were expressly told that some of the cloths belonged to the plaintiff, and that it could be satisfactorily proved to them, one of them said they should be taken, whether right or wrong. He therefore confessed that he was guilty of an error in seizing them. The principle on which the case of *Parton v. Williams* was decided was, that the eighth section of the statute was wholly independent of the sixth, and that in order to bring an officer within the latter clause, it was necessary that he should act most strictly in obedience to his warrant. But there it does not appear that the defendants were commanded by the warrant to take any specific goods, as here, but merely that they were to take the goods of a particular person, which is a most material distinction; and in *Postlethwaite v. Gibson (a)*, Lord Kenyon expressly decided, that "the eighth section of the statute 24 Geo. 2. applied to cases only where there has been a warrant granted by a Justice of Peace, and the constable is acting under it." The words "acting as aforesaid" in that section, must therefore have reference to those in the sixth, viz. "acting in obedience to the warrant of a Justice;" and if a party merely act in the character of constable, without paying the strictest obedience to the terms of such warrant, he does not fall within the protection of that statute.

*Cur. adv. vult.*

Lord Chief Justice DALLAS now delivered the judgment of the Court, as follows:—This was an action of trespass. The first count of the declaration was for breaking and entering the plaintiff's house and seizing and taking his goods, and the last was confined to the seizing the goods generally.

(a) 3 Esp. 227.

Some of the defendants acted as constables, and others in their aid, and at the trial, they produced a warrant of a Justice of Peace, requiring them to search the plaintiff's house for some black kerseymere cloth which had been lately stolen, and suspected to be concealed there, and authorising them to seize the same. They accordingly searched and seized cloths of other colours, which did not strictly fall within the description of that in the warrant. The action was not brought within six calendar months from the time of the seizure, and the question is, whether the defendants are entitled to the protection of the statute 24 Geo. 2. c. 44. s. 8? And we are of opinion that they are. The case of *Parton v. Williams* is in point, where the defendants, acting as constables under a warrant commanding them to take the goods of *A.*, took the goods of *B.* by mistake, and the Court of *King's Bench* held that they were entitled to the protection of the eighth section of the statute, and that the action was ill brought, after the lapse of six calendar months. All the Judges there decided, that that section was intended to afford to constables some benefit not given by the sixth, observing, that the latter protected them absolutely, and at all times, against any action for acts falling within it, viz. "acts done in obedience to a warrant," and that it was nugatory to limit actions to six months by the eighth section, which, by the sixth, could not be brought at all. In that case, however, it does not appear that the decision of this Court in *Price v. Messenger* was adverted to, where the defendants, having a warrant to search for and seize stolen sugar, seized certain sugar which was not stolen, and also some nails and tea; and Mr. Justice *Heath* is reported to have said, that "when the defendants seized the teas, they were not acting in obedience to the warrant." Still, the question did not arise there, as the defendants had suffered judgment by default as to the tea and nails, and the argument and decision of the Court were confined to the sixth section of the statute, namely, that the defendants acted in obedience to the warrant, and

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were within the protection of that section, although the sugar seized by them, turned out not to have been stolen, and no question whatever arose on the eighth section of the statute. The only remaining case that militates against *Parton v. Williams*, is that of *Postlethwaite v. Gibson*; that, however, was a mere *Nisi Prius* decision, and the plaintiff was ultimately nonsuited, so that there was no opportunity of bringing the question before the Court. That case, therefore, was properly disregarded in *Parton v. Williams*. There, the Court did not expressly decide that the eighth section applied to all cases of constables acting as such; but it may, however, be inferred from their reasoning, that they thought so, and we are of opinion, that such is the true construction. The words "as aforesaid" there, refer either to those immediately preceding, namely, "for any thing done in the execution of his office", to which extent parties are protected by that section, and it would be strange if constables were not equally protected;—or else, they are explanatory only of the word "person"—and the words "or person acting as aforesaid" in that section, means any person, not an officer, acting in aid of such officer. The cases of *Godin v. Ferris* (a), and *Saunders v. Saunders* (b) shew, that where a statute fixes and limits a time within which an action must be brought against an officer for any thing done by him in the execution of his duty, the time must be computed from the original seizure of the goods, and there is no distinction, whether such action be brought in trespass, or in trover. Here, however, the defendants were protected by the eighth section of the statute, although they might not be by the sixth, for the former was intended to apply to cases where the latter does not, and to give an additional benefit to officers acting under a warrant of a Magistrate. The case of *Theobald v. Crichmore* is in point to shew, that although an officer might exceed his authority in the

(a) 2 Hen. Bl. 14. ————— (b) 2 East, 254.

execution of a warrant of distress, still, that he was not liable to an action unless it were commenced against him within the time, as specified in the statute,

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Rule refused.

Mr. Serjt. *Hullock*, *amicus curiæ*, in the course of Mr. Serjt. *Pell*'s argument, mentioned the case of *Field v. Croft*, from the Home Circuit, which was decided in the *King's Bench*, within the present Term, on a motion for a new trial, and the Court acted on the authority of *Parton v. Williams*, and held, that a party who acts as constable at the time, is protected by the eighth section of the statute 24 Geo. 2, although he may not act in obedience to the warrant of a Magistrate. It seems, therefore, that if a constable were to act in his character as such, even without a warrant, that an action must be brought against him within six calendar months from the time of the act complained of (a).

(a) In *Alcock v. Andrews* (\*), Lord *Kenyon* held, that a constable acting *colore not virtute officii*, was not protected by the eighth section of 24 Geo. 2, from actions brought after the expiration of six months; but in *Graves v. Arnold* (†), which turned on the construction of a similar clause in a local act of parliament, viz. 50 Geo. 3. c. 149, Sir *James Mansfield* held that the constable was protected, as he was acting under the colour of the statute, and believed himself to be exercising the powers conferred by it, although by virtue of the statute he might not be justified in what he did.

(\*) 2 Esp. 542, (n.)———(†) 3 Campb. 242.

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Monday,  
May 14.

WRIGHT v. AGER.

In an action of debt, to recover penalties against a sheriff's officer, for extortion, under the 32 Geo. 2. c. 28. the Court will not allow the declaration to be amended, by inserting new counts on the 23 Hen. 6. c. 9.

THIS was an action of debt, to recover penalties from the defendant, a sheriff's officer, for extortion, in having taken 5*l.* 10*s.* more than he was entitled to, on the arrest of the plaintiff. The declaration contained several counts, founded on the 32 Geo. 2. c. 28.

Mr. Serjt. *Blosset* now moved to amend it, by adding new counts, to be framed on the 23 Hen. 6. c. 9. It appeared, that two Terms had elapsed since the return of the writ; but the learned Serjeant submitted, that as the cause of action would be substantially the same, by the mere introduction of those counts, the amendment might be allowed; and he referred to the case of *Freen v. Cooper* (a).

But the Court observed, that this was a penal action; that the statute 23 Hen. 6. was nearly obsolete; and that the plaintiff having made his election to sue on the 32 Geo. 2. he must now abide by it.

The learned Serjeant, therefore, took nothing by his motion.

(a) 2 Marsh. 59.

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Tuesday,  
May 15.

## BAMFIELD v. ANDERSON, Bart.

MR. Serjt. *Lens*, on a former day in this Term, had obtained a rule *nisi*, that an *exoneretur* might be entered on the bail-piece in this cause, on an affidavit which stated, that the defendant was arrested on a bill of exchange for 855*l.*, drawn in *Ireland*, and accepted by him and his father;—that the defendant had obtained his certificate in that country;—and that the debt was contracted there before his discharge. He referred to the case of *Ballantine v. Golding* (a), where a rule similar to the present was made absolute, the defendant having been a bankrupt, and obtained his certificate in *Ireland*; and Lord *Mansfield* there said, that “it is a general principle, that where there is a discharge by the law of one country, it will be a discharge in another.”

The Court will not order an *exoneretur* to be entered on the bail-piece, on the ground of the defendant's having obtained his certificate in *Ireland*;—but will direct an issue, in order to ascertain the circumstances under which the original debt was contracted.

Mr. Serjt. *Taddy* now shewed cause, and submitted that the certificate did not apply to this action, as the bill was payable in this country, and it was sworn, that the consideration for which it was given arose here, and that the bill was accepted by the defendant and his father as partners. At all events, the Court will not afford the relief sought for by this summary application, but leave the defendant to plead his certificate in bar.

The Court observed, that where the debt arose, was a question of fact, and could not be disposed of on an application of this description; and they referred to the case of *Potter v. Brown* (b), where it was decided, that the defendant's certificate in *America*, was a bar to an action on a bill drawn by him there, on a person resident in this country, which was not accepted, on the ground that the debt for which the

(a) Cooke's Bankrupt Laws, vol. i. 5th edit. page 499.——

b) 5 East, 124.

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bill was given, was incurred in *America*, and that it having been refused acceptance here, the implied promise to pay the money arose there. This, however, is a mixed case, for it is stated, that the consideration for which the bill was given, arose in this country, and that the defendant accepted it with his father, as partners. These facts, therefore, must be inquired into, as well as whether the original debt was contracted by the defendant's father, or himself, or whether it was made on the partnership account.—They therefore directed an issue as the proper means of ascertaining whether the debt in question was discharged by the certificate; and this rule was consequently

Discharged (a).

(a) See *Phillipotts v. Reed*, ante, vol. iii. page 244, where the Court refused to discharge a defendant, on entering a common appearance, on the ground of his having become insolvent and obtained his certificate at *Newfoundland*, but left him to plead such certificate in bar.

#### IN THE HOUSE OF LORDS.

Friday, May 18. SMITH v. DOE, on the Demise of the Earl of JERSEY, and Others.

Under a power **A** WRIT of error, returnable in Parliament, having been given by a marriage settlement to a tenant for life, to lease for years, determinable on three lives, reserving the ancient and accustomed rents, duties, &c. "so as there be contained in every such lease a power of re-entry for non-payment of the rent thereby to be reserved:—A lease for ninety-nine years, determinable on three lives, with a proviso for re-entry "if the rent, duties, &c. should be unpaid, or undone in part or in all, by the space of fifteen days next over or after the day of payment, &c. and no sufficient distress or distresses could be had or taken on the premises:—was held, in an action of ejectment by the reversioner against the lessee, to be a valid execution of the power:—Held also, that evidence was admissible to shew that the usual form of leases of the estate in settlement for years, determinable on three lives, as well prior to as after the settlement, was with a similar conditional proviso for re-entry;—the tenant for life having under the power, a discretion as to the terms of the proviso, which the power required generally to be inserted in such lease (\*).

(\*) See a more full marginal abstract of this case, ante, vol. iii. page 339.



*chequer Chamber*, in this case (a), the original defendant, (plaintiff in error), prayed that it might be reversed, and the former judgment of the Court of *King's Bench* in his favour be affirmed (b), for the following, amongst other reasons :—

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First, Because the intention of the donor of a power is to be collected from the whole of the deed whereby that power is created; from the plan and design of it as well as the words, and also from the circumstances of the property which is by him subjected to the operations of that power; and in the construction of the particular instrument executed under such power, the law will expound it, with an inclination to preserve rather than to destroy the instrument; "*ut res magis valeat quam pereat*." "It is the office of a Judge to preserve, not to destroy an estate (c)."

Secondly, Because the only objection raised to the lease under which the plaintiff in error holds, is, that the proviso for re-entry therein contained, is not such as is required by the leasing power under which it was granted by Lord *Vernon*, as not being absolute, unconditional, and capable of being enforced *instantly* upon every default of payment of rent, on the very day on which such default takes place; but the words of the power do not, as the plaintiff in error submits, require a proviso for re-entry, absolute, unconditional, and capable of being enforced *instantly*, such words being only "so as there be contained in every such lease, a power of re-entry for non-payment of rent." It is undoubtedly a condition precedent to the due execution of the leasing power, that there should be reserved in all leases granted under such power, "a power of re-entry for non-payment of rent;" but in what terms that power of re-entry is to be reserved, the settlement is wholly silent, and the argument for the defendant in error is, that from the non-expression of

(a) See ante, vol. iii. page 339.—(b) See 5 Maul. & Selw. 467.—  
(c) See *Cotter v. Merrick*, Hardr. 93, per Mr. Baron Parker.

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any terms in which that proviso is to be framed, it necessarily results, that the comprehensive expression, "a power of re-entry," (which comprehends and includes every proviso of re-entry adapted to the object for which it is required), must be narrowed to one particular proviso for re-entry, absolute, unconditional, and capable of being enforced *instantly* upon every default. But it is submitted, the expression "a power of re-entry," is no description of the particular form, though it is of the general object of the condition to be introduced into the lease, and that the language of the leasing power is fully satisfied by a proviso for re-entry such as is contained in the lease now sought to be set aside by Lord *Jersey*, which, though not an absolute, unconditional proviso, and capable of being enforced *instantly* upon every default, is nevertheless "a power of re-entry" sufficient for the object for which it was required, such as was in use upon the estate to which the leasing power applies at the time it was created, and such as the general term used in the leasing power, so far from either expressly or impliedly disapproving, seems advisedly to sanction, especially, when it is recollected, that in a subsequent part of the same leasing power, as applicable to the rack-rent estates, the donor of the power omits the general and larger term, "a power of re-entry for non-payment of rent," and specifically chalks out the very power to be introduced into such leases, *viz.* "a clause of re-entry, in case the rent to be reserved be behind or unpaid by the space of twenty-eight days after the times thereby respectively appointed for payment thereof." Thus, in this latter case, where large rents were to be secured, defining the extent of indulgence to the tenant, and furnishing the very clause to be introduced, as contra-distinguished from the more general and comprehensive expression previously used, *viz.* "a power of re-entry for non-payment of rent,"—Can it be successfully contended, that this expression conveys a perfect idea to the mind, of the nature and form of the power of re-

entry required? It points out, indeed, distinctly, the wish of those who framed the settlement that there should be some power of re-entry in all leases of this description, but not the precise terms in which such power shall be reserved. Had the power required a covenant on the part of the lessee, to build a house upon the premises, it would still have been a question, what house,—and a lease stipulating for the building a house of given dimensions, and within a prescribed time, must have been judged of by the law as a reasonable or unreasonable compliance with the condition.

Thirdly, If the language of the leasing power has been literally attended to in the lease executed under such power, the next consideration will be, whether the spirit also is preserved; or whether there be any thing in the plan or design of such leasing power, and the circumstances of the property to be leased, which, by disclosing a different intention in the donor of the power from that which occurs on the mere reading of the words themselves, thereby imposes a different construction upon such words. The leases under the power are of three sorts. First, leases for lives, or determinable on lives, which are renewable on fines, and where the rents reserved are nominal: secondly, leases for years, where a rack-rent is reserved: and thirdly, mining leases, in which no reservation of a power of re-entry is required. The lease in question is of the first sort, and the proviso, therefore for re-entry, is rather introduced with a view of enforcing regular acknowledgments of the tenancy, than of securing a succession of large payments at stated periods. It is not improbable, therefore, with such an object, that some discretion should be left to the person by whom the power was to be executed, as to the form of the proviso. If the words of the leasing power allow such discretion, is there any reason on which its exclusion can be founded? Is the security of the nominal rents endangered by it? Are the acknowledgments of a subsisting tenancy less likely to be regular in a case where the property of the

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tenant, if hazarded by irregularity, is hazarded to so great an extent as that of the loss of a valuable lease for lives held under a nominal rent, than where it consists only of a short term at a rack-rent? On the contrary, considering that two objects must have been presented to the mind of the framer of the leasing power: first, the securing the rents to those who were to benefit by them; and secondly, the preservation of the estate in good condition when the lease determined:—has not the language of the power been designedly varied, when directing the reservation of the right of re-entry in the two sets of leases? In the leases for lives, where a small proportion of the annual value is to be paid in the shape of rent, and where a distress might be resorted to without injury to the estate, a mere reservation of the right of re-entry is required, in such manner and form as should be found discreet and beneficial, and adapted to the object in view; but in the rack-rent leases, a precise and well-defined clause of re-entry is pointed out, because the interest of both tenant for life and remainder-man is materially consulted, in the reserved power of re-possessing themselves of land, for which the lessee is not able to pay the rack-rent within twenty-eight days from the time of its becoming due, and where a distress taken for such rent, if resorted to, would probably not secure the rent, but certainly injure the cultivation of the estate.

Fourthly, Because, if the literal language of the condition be not violated, and there be nothing in the spirit of the leasing power, giving a meaning beyond the words used, the principle which has hitherto governed in cases of this kind, must govern in this case, which is, that where a special clause of re-entry is prescribed by the power, that clause cannot be departed from, even in trivial circumstances, without defeating the lease made under the power; the donor of the power being in this respect the legislator, and having a right to impose any condition precedent he pleases, provided it be not inconsistent with law,

and which, when once plainly expressed by him, is not subject to any examination of its reasonableness or unreasonableness. But, if no special clause be furnished by him, but merely a direction given that certain leases shall contain "a power of re-entry," then, if a clause reserving the right of re-entry be inserted, the will and direction of the legislator is complied with, unless the power be executed in a fraudulent or illusory manner, which neither law nor equity would hold to be any compliance at all. Such is the true result of *Coxe v. Day* (a), explained as that case is by the subsequent decision in this case, when in the Court of *King's Bench*, of two of the same learned Judges who signed the certificate in *Coxe v. Day*; for in the last-mentioned case, the power having prescribed a particular clause, that is, in the event of the rent being behind a specified number of days, those learned Judges held a proviso for re-entry, which added terms not used in the particular clause prescribed by the power, to have vitiated the lease. But, in this case, the settlement only requiring "a power of re-entry for non-payment of rent," and the lease containing the clause of re-entry in question, they considered the words of the power to have been complied with, such compliance being not only literal, but not impeachable on the ground of any fraud or contrivance, and, on the contrary, fair and reasonable.

Fifthly, In considering whether the lease be bad on the ground of any excess in the indulgence given to the tenant, where the power, as in this case, prescribes no precise clause of re-entry, is most material to ascertain what was the indulgence granted in leases of this estate prior and subsequent to the settlement creating this power. No such inquiry, it may be safely conceded, can be admitted, where the precise clause is prescribed by the power; but where the power is silent as to the particular nature of the condition, if, as it is humbly contended, it follows from thence that

(a) 13 East, 118.

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some discretion is to be exercised by him who executes the power in framing the condition, the discretion heretofore sanctioned by her, who if she had spoken, must have been abeyed, is fit evidence to guide the judgment where she has been silent. It seems difficult to maintain by argument, that where, by the terms of the condition, reference is made to prior leases impliedly, as where "ancient" or "accustomed" rents, or rents "as beneficial as the ancient rents," are spoken of, such evidence is not admissible to ascertain either the propriety of the new rents, as compared with the old rents in amount, or the propriety of the mode in which they are reserved or secured as compared with the ancient mode of reserving or securing them. But it is said, there is no implied reference in the very words directing the reservation of the power of re-entry. If, however, the words "a power of re-entry for non-payment of rent," embrace every power of re-entry, properly so called, then some assistance is necessary to ascertain what particular power of re-entry should be introduced, and none better can be had, than that which the leases prior and subsequent to the settlement furnish, as directing the will of her whose will alone is to be consulted on the occasion: and though it is clear, that her will of to-day cannot be contradicted by her will of yesterday or to-morrow, yet it is equally clear, that those who contend that such will must be the sole guide, must be content to find it elsewhere, if they cannot find it in the power itself. For however general the power in its terms, it seems not more repugnant to reason to contend, that the execution thereof is thereby left absolutely to the tenant for life, since that would destroy the condition altogether, than to contend that the very generality of the words confines its execution to one, and one only form of proviso for re-entry, and that of the narrowest and most limited form. But upon sound reasoning it must be conceded, that in such case the limit to the exercise of discretion by the tenant for life must be sought for, either in the arbitrary rules of law, or in such facts as

are fit to regulate the decision of the law; and as in the same power, for a different object, *viz.* the reservation of the rent, the settlor has himself impliedly referred to former leases; why may he not be considered also, in this particular, as referring to former leases, and therefore framing the power in general terms? Either that must be the conclusion, or some more unsatisfactory source of evidence must be introduced, or there must be no limit to the discretion of the tenant for life, or the power must be narrowed to something less than its terms by some supposed will of the settlor, not evidenced either by his words or his acts. The evidence therefore, admitted at the trial, the plaintiff in error humbly contends, was properly admitted, and the result drawn by the Jury, a matter of much weight in the consideration of this case.

Sixthly, If the terms of the power be such as to leave the terms of the proviso unfettered by positive direction, there seems little reason to quarrel with the extent of the indulgence in point of time, granted to the lessee; and such has been the concession throughout the argument of this case. Much more fault has been found with the latter qualification of the proviso, by those who have argued for the defendant in error, *viz.* with that part which restrains the right of re-entry to the case where no sufficient distress or distresses may be had or taken upon the said premises. The reasonableness of this qualification, as applied to the particular rents reserved in these leases, and the nature of the property leased, has been already pointed out: in addition however, to these reasons, it is to be observed, that the statute law of the land has not only spoken the same language, plainly and intelligibly, but it may be doubted whether it has not restricted all lessors from exercising any right of re-entry not guarded by this reasonable qualification. The 4 Geo. 2. c. 28. s. 2. provides, that as often as it shall happen "that one half-year's rent shall be in arrear," the lessor "*shall and may*," without any formal demand or re-entry,

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serve a declaration in ejectment for the recovery of the premises; and in case of judgment against the casual ejector, if it shall be made appear to the Court that half-a-year's rent was due before the declaration was served, "and that no sufficient distress was to be found on the demised premises," and that the lessor had power to re-enter, then he shall be entitled to judgment and possession. It then proceeds to bar all relief against such judgments, unless upon payment of such rent and arrears, together with full costs, within six months. The interests of the lessor and the lessee are by this statute equally provided for: the former is relieved from the formalities of the old common law entry; the latter is protected against the forfeiture of his interest, in case there be sufficient to satisfy the rent by way of distress upon the premises. The legislature has thus recognized the reasonableness of a provision preventing forfeiture, where there is a sufficient distress, and so far affords a strong argument in favor of the clause for re-entry contained in the lease now under consideration. But has it not gone further? Do not the words speak imperatively, that no re-entry shall be enforced, where there is such sufficiency of distress? The language of the 8 & 9 Will. 3. respecting the breaches to be assigned upon bonds, is not so strong; for there the legislature only says, the plaintiff "*may*" assign as many breaches as he shall think fit upon the bond, giving the defendant the opportunity of paying money into Court after judgment and before execution. But the Courts of law have construed this statute as imperative upon the plaintiff to do what he is there told he "*may*" do; whereas, in the 4 Geo. 2. the language is "*shall and may*:" and as in both statutes the object is the same, *viz.* to relieve the subject from the necessity of seeking the aid of a Court of equity against the technical difficulties of the common law, why should not this equitable provision in each statute be construed to be a compulsory provision, and especially in the statute 4 Geo. 2. where it is introduced with the words "*shall and may*"? If it be a compulsory provision, applicable to all cases of re-entry, and



not confined to cases of re-entry under that statute, then the clause in question conforms itself to the law, and no more : if it be applicable only to cases under that statute, then, by analogy thereto, this leasing power is reasonably executed, being qualified in its execution by what the law of the land has deemed reasonable, and being, from the terms in which it is penned, open to such qualification.

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The original plaintiff (defendant in error) submitted, that the judgment of the Court of *Exchequer Chamber* was right and according to law, and that the same ought to be affirmed, and the original judgment of the Court of *King's Bench* reversed, for the following, among other reasons :

First, Because the leasing power in the marriage settlement of 1757, (a power granted by a person having the absolute dominion of the fee to a purchaser of a life estate) expressly requires, that the lease shall contain " a power of re-entry for non-payment of the rent thereby to be reserved," which makes it necessary, it is submitted, that the right to re-enter should attach immediately on the rent being unpaid ; whereas, the lease under which the defendant in the ejectment claims, postpones the right of re-entry for fifteen days after the day of payment ; thus depriving the reversioner of a part of that benefit which by the condition annexed to the leasing power, was intended to be secured to him. If such postponement be allowed for fifteen days, why may it not be allowed for thirty, forty, one hundred, or any other number of days so great as to make the power of re-entry nearly or quite unavailing ? Where is the line to be drawn ? If it be allowable to deprive the reversioner of any part of that right of re-entry, which the creator of the leasing power says he shall have, of what part may he be deprived ? It is submitted, that only two lines can be drawn ;—either the tenant for life is obliged to reserve the whole right of re-

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entry, or no part of it; and as it is conceived, that the latter rule cannot be supported, it follows, that the right of re-entry in the lease should be fully commensurate with that required by the leasing power, and that this lease is void as an execution of that power.

Secondly, Because the lease in question, is liable to the further objection, that the leasing power requires that the lease shall contain "a power of re-entry for non-payment of the rent thereby to be reserved," whereas, the lease contains no such power, but only gives the lord a right to re-enter for the absence of distress for rent unpaid. The meaning of the words of the leasing power is perfectly plain and unequivocal; "a power of re-entry," it is conceived, means something enabling a man to re-enter, and "a power of re-entry for non-payment of the rent," signifies something enabling a man to re-enter on the occasion, or for the cause of non-payment of rent; now the leasing power in question, certainly does not enable the reversioner to re-enter on such occasion, or for such cause; inasmuch as the whole rent for any number of years may be unpaid, and yet he may not be enabled to re-enter (a).

Thirdly, It is said, in support of the lease, that the creator of the power has used very general language, that a power is required, without saying what power; and that the power of re-entry in this lease is sufficient, because it is a reasonable power, and was usual on the estate. It is true, the language of the leasing power is general, so general, that only one quality is specified, which the power of re-entry is required to have, *that it should be for non-payment of the rent*; but the creator of the power having exacted this one condition only, is certainly no reason why a compliance with that condition should be dispensed with. The leasing power requires, that the power of re-entry should be *for non-payment of the rent*, and it does not require that it should be usual or reasonable; why, then,

(a) See *Coxe v. Day*, 13 East, 118, where this point was expressly decided.

should the leasing power be so construed as to dispense with the former condition, which by its terms is annexed to its execution, and to exact a compliance with the latter, which is not so annexed. Besides, it is not found that this conditional clause of re-entry is reasonable, or that it is usual generally; it is only found to be usual on the estate, which is not only not the same thing as usual generally or reasonable, but may be the direct contrary. The generality of the word *a*, (relied on in support of the lease) must certainly exclude a reference to any particular class of clauses of re-entry, such as those on this estate; as nothing can be more opposite to a general word than a word of reference. If this leasing power be construed to require the power of re-entry usual in cases of the lands comprehended in the settlement, although in this particular case this construction will operate to the advantage of the lessee, yet, it may in other cases be productive of the greatest inconvenience to him. Suppose a lease under a power, in the terms of this leasing power, to be on the face of it conformable to the power, yet, if this construction prevail, the reversioner will have a right to avoid the lease, if he can shew that the clause of re-entry is different from that which is usual on the estate comprehended in the leasing power. The inconvenience to both parties will be extreme, if a lessee cannot be sure that he has a valid lease, by comparing his lease with the power, without inspecting all the leases formerly granted of lands within the same estate. It is submitted, that what the creator of a power has required, must be done for this one reason, of itself sufficient, that it is required, and that it is a much safer rule to adhere to that condition which is expressly annexed to the execution of a power by one who has all the circumstances of the property before him, and who has the right to enlarge or narrow the power to any degree, than to substitute for what he has exacted, something which it may be conjectured he ought to have exacted, but has not.

Fourthly, Because the power of re-entry in the lease is not only different from that required by the leasing power, but

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much less beneficial to the reversioner. Under an absolute power of re-entry, the reversioner would be entitled to succeed in an ejectment, on proving the rent in arrear, a demand made, and the execution of the counter-part of the lease by the defendant. Under a power to re-enter on failure of distress, it would be necessary for him to prove, that he had searched every part of the premises demised, and that no distress was to be found (*a*), a matter of extreme difficulty where the rent is small and the premises extensive. A conditional clause of re-entry, which may be an adequate remedy in the case of high rents and lands of small extent, becomes quite insufficient when the rent is small, as is usually the case with ancient rents, and the lands demised of considerable extent. And as the absolute power of re-entry becomes the more necessary for the lord, in case of small rents for large property, so it becomes the less inconvenient for the tenant, who might have some difficulty, and expect some indulgence to raise a large sum, but can have none in being ready with a small one. It is indeed universally true, that in order to secure a small demand, the remedy should be more summary, and less expensive than is requisite to enforce a large one.

Fifthly, Because, it is submitted, that the finding of the Jury, that the usual and accustomed form of leases of the estate contained in the marriage settlement, was with a conditional proviso of re-entry, ought not to be taken into consideration in deciding this case. The words of the leasing power are "a power of re-entry for non-payment of the rent thereby to be reserved;" they contain no reference to the former practice of leasing the estate, nor is there any fact stated on the special verdict, which raises any ambiguity in them; and it is submitted, that a provision contained in a written instrument, may not be explained or construed by any extrinsic matter, except in two cases only;

(*a*) *Rees, d. Powell v. King*, Ferr. Exch. Rep. 19.

First, when the provision refers to extrinsic matter; secondly, when its terms contain a latent ambiguity, that is, when in consequence of some matter of fact shewn by evidence, it appears that the language of the instrument has more meanings than one, neither of which is the case with the clause in question.

Sixthly, Because, even supposing the former practice on the estate might legally be taken into consideration, it is far from affording any inference favorable to the lease in question. It is not found that the former leases were granted under similar powers. There is nothing to shew that the creator of the power was not dissatisfied with the former clauses of re-entry, and did not insert the provision in question for the very purpose of introducing a new one, which might well be, for the reasons above stated. And this is the more probable, because the leasing power, in several instances, expressly refers to the former practice on the estate, where it was intended that the tenant for life should be guided by it; there is no such reference in the clause relating to powers of re-entry; the inference is, that the practice was not intended to prevail with respect to powers of re-entry.

T. JERVIS.

W. H. MAULE.

The case was appointed to be heard at the bar of the House of Lords, and was accordingly argued there on the 19th, 22d, and 26th June, 1820, by the Attorney-General, (Sir R. Gifford) and Mr. Puller, for the present plaintiff in error, and by Mr. Jervis and Mr. Maule, for the defendant in error.

For the plaintiff in error, the cases of *Jones, d. Cowper v. Verney* (a), *Hotley v. Scot* (b), *Lord Tankerville v.*

(a) Willes, 169.——(b) Loft. 316.

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(a) Lord TANKERVILLE v. WINGFIELD and PRITCHARD (*).

Where a power of leasing for years required the insertion in the leases of a clause of re-entry if the rent should be behind for twenty-one days: and leases were afterwards made with a power of re-entry if the rent should be behind or unpaid for twenty-one days, and no sufficient distress could be had:—Held, that such leases were valid, and might be supported.

UPON an ejectment, the case was as follows:—Upon the marriage of Sir John Astley, his lady's estate was settled upon him for life, with several remainders over, which never took effect; remainder to her right heirs. A power of leasing was given to Sir John; such leases to be made for any number of years, at the accustomed rent, to take effect immediately in possession, and not by way of future or reversionary interest; and in every such lease there was to be inserted a clause of re-entry, if the rent should be behind for twenty-one days; the rent to be made payable, and the re-entry to be incident to, and to go along with the reversion or remainder. In the same settlement, there was also a power of revoking all the uses thereby declared, and appointing new. Some time after the marriage, Sir John and his lady revoked all the uses of the settlement that were subsequent to his life estate, and the powers incident thereto, and declared new uses. There was also a fine levied to the same effect.

On the 21st September, 1766, Sir John made two several leases of that date to the two defendants for twenty-one years, conformable to the power he had by the said settlement and the other deeds, and the fine, except that, previous to the entry, distress was to be made; and it ran nearly in the following words:—"That if the rent should be behind or unpaid by the space of twenty-one days, and no sufficient distress or distresses could be had, or if the lessee should assign over the leased premises (except as therein was excepted) then it should be lawful to Sir John, his heirs and assigns, to enter."

Sir John and his lady being both deceased, the estates descended upon Lord Tankerville, the plaintiff, &c.

Mr. Dunning, for the plaintiff. The Court always takes a difference between powers, when exercised by a man upon his own estate, and the exercise of powers by a man upon another's estate, or which he holds in another's right. The first are always construed favorably to the persons making use of such power; the second are taken in a strict light. Here it was certainly the second.—It was a power to be exercised on the wife's estate, and, in some respect, to her prejudice, and therefore to be taken strictly.—First objection. That the settlement declares, that the power of re-entry should be reserved and made incident to the inheritance of the estate; and by the lease, it is reserved to Sir John, his heirs and assigns. Second objection.—The settlement directs the re-entry so to be reserved as above, to be made immediately, if the rent should be be-

(*) This case was adverted to by the present Attorney, then Solicitor General, in the course of his argument in the *Exchequer Chamber*, from a MS. note of Mr. Butler, and is the same as that reported in Loft, under the name of *Holley v. Scot*. See ante, vol. iii. page 368.

(b) 13 East, 118.—(c) Forr. 19.—(d) 2 Campb. 520.

den v. May (a), Wadman v. Calcraft (b), Goodtitle, d. Clarges v. Funucan (c), Doe, d. Vaughan v. Meyler (d),

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hind by twenty-one days. By the lease it is to be preceded by demand and distress.—These are strong, plain, and conclusive objections.

Mr. *Bearcroft* for the defendants. The remainder-man, Lord *Tankerville*, has substantially all the powers he ought to have, or can have. As to the first objection, the rent cannot be made payable but to those in remainder or reversion, to which it is inseparably incident. The heirs and assigns of Sir *John Astley* mean those who are heirs and assigns to the estate under the settlement by which he claims the estate. *Cotter v. Merrick* (*). Tenant in tail died seised, his son entered and made a lease for twenty-one years, rendering rent during the term, to the lessor, his heirs and assigns, and died. It was unanimously adjudged to be a good lease, and within the 32 Hen. 8, the opinion of the Court being, that the word "heirs" being a comprehensive word, it ought to be construed *secundam subjectam materiam*, and to have that which the nature of the deed requires. This is much the stronger in the present case, as Sir *John*, having joined with his wife in the deeds which raised the limitations, those who take by virtue of those limitations may, in some respects, be said to be the heirs and assigns of Sir *John Astley*.—As to the second objection, that the re-entry which is directed by the power in the settlement to be reserved immediately on the rent being behind twenty-one days after it is due, is, by the lease, to be preceded by distress and demand. The words in the settlement are short and loose, and seem to be no more than a general direction, that in every lease to be made under this power, there should be contained a clause of re-entry. It is not a formal description what kind of re-entry should be reserved, or of any particular clause of re-entry. It is a direction that the power of re-entry, usually inserted in leases, should be inserted in those to be made under this power, in the usual manner. This, I apprehend to be a sufficient answer to the objections raised against these leases; each is a verbal objection, and I have given each a verbal answer.

Mr. *Dunning*, in reply. The distinction I set out with, and the consequences of it, that these leases are to be considered in a strict light, is not denied; and besides this claim to the favor of the Court, Lord *Tankerville* has that of being the heir-at-law of the owner of the estate on which this power has been exercised. Lord *Tankerville* is neither the heir nor the assignee of Sir *John Astley*; he claims by a title paramount to Sir *John's*. The rent is directed by the settlement to be incident to the inheritance, that is to say, to be to the several limiters of the settlement, when respectively in possession. The reservation is to the heirs and assigns of Sir *John Astley*. They are not limiters. This is there-

(*) Hardr. 89.

(a) 7 East, 237. S. C. 2 New Rep. 449, and 9 Ves. 325.—
(b) 10 Ves. 68.—(c) 2 Doug. 565.—(d) 2 Maul. & Selw. 276.

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Coke Littleton (a), and the statute 4 Geo. 2. c. 28, were adverted to and commented on at considerable length.

fore not a proper execution of the power. The case cited, and the act of parliament 32 Hen. 8, only shew, that if a tenant in tail make a lease according to the statute, and reserves rent to himself and his heirs, the word "heirs," or the words "heirs and assigns," may be construed to be such heirs as may succeed by force of the entail. This construction can never, in the present case, take in Lord Tankerville, who cannot, in any sense or meaning whatever, be deemed the heir of Sir John Astley, or his assigns. It is sufficient to say, that in pleading he could never be described as such. As to the words in the settlement being loose, and directing what should be done, and not describing how it is to be done, this seems a frivolous distinction. The settlement directs a clause of re-entry to be inserted in the lease; the lease says that it shall not be lawful for Sir John Astley to enter as long as there is a sufficient distress or distresses to be taken on the premises. Till then, it is postponed. This is contrary to the words of the settlement, and is not a proper execution of the power.

Lord MANSFIELD.—The two objections made to these leases, are, first, that by the settlement, the re-entry is to be made incident to the rent; but by the lease it is reserved to Sir John Astley, his heirs and assigns.—And, in the event, it has not followed the rent, but gone to the heirs of the lessor, Sir John Astley, while Lord Tankerville is in the lawful possession and receipt of the rents: secondly, that the clause of re-entry, which, by the settlement, ought to be immediate, is by the lease fettered, being on a previous demand and previous distress. As to the first objection, by the nature of the power, it must go with the reversion and inheritance. The person who is in the reversion and inheritance, is he that is to enter on the forfeiture of the lease, and no one can enter but he to whom the rent is payable; for, as *Littleton* says, "no stranger can enter for forfeiture; for a stranger cannot be in by his former estate." If the rent had been reserved for the term, as in the case of *Cother v. Merrick*, still, it goes with the inheritance. "Heirs and assigns" can only mean those who have the reversion and inheritance; otherwise, as is said (*), they would be words of surplusage. The clause of re-entry must go with the inheritance the same as the rent; for it cannot be reserved to any body but to him who is seised of the inheritance. It was said, that it ought to have been worded to the person next in reversion or remainder. The words "heirs and assigns" are general words, and are as good and quite tantamount to particular words.—As to the second objection, the clause of re-entry is short, with words of course, and does not preclude the operation of law. A re-entry is to enforce the payment of rent; it is an immediate forfeiture of the estate by common law. By statute, it cannot be without a want of distress. Therefore, on both points, we agree to support the leases; so the verdict must be entered for the defendants.

(a) Sect. 325.

(*) Sec 2 Wms.'s Saund. 370.

For the defendant in error were cited *Tooke's Diversions of Purley* (a), *Comyns' Digest* (b), *Grygg v. Moyses* (c), *Lord Petre v. Lord Auckland* (d), *Sugden on Powers* (e), *Hawkins v. Kemp* (f), *Wright v. Wakeford* (g), *Doe, d. Mansfield v. Peach* (h), *Wright v. Barlow* (i), The statute 54 Geo. 3. c. 168, *Pomery v. Partington* (j), The statute 33 Hen. 8. c. 39. s. 53., *The Attorney-General v. Andrew* (k), *Fitzgerald v. Lord Fauconberg* (l), *Orby v. Lord Mohun* (m), *Campbell v. Leach* (n), *Holmes v. Coghill* (o), *Sheppard's Touchstone* (p), *Cotter v. Merrick* (q), *Thomas v. Howell* (r), *Altham's Case* (s), *Viner's Abridgment* (t), *Doe, d. Scholefield v. Alexander* (u), *Rees, d. Powell v. King* (x), *Core v. Day* (y), *Doe, d. Allan v. Calvert* (z), *Cooke v. Booth* (aa), *Baynham v. Guy's Hospital* (bb), *Eaton v. Lyon* (cc), *Moore v. Foley* (dd), *Coke Littleton* (ee), The statutes 34 Hen. 8. c. 24., 11 Geo. 2. s. 19., 8 & 9 Will. 3. c. 11. s. 8., *Thompson v. Lady Lawley* (ff), *Nugent v. Cuthbert* (gg), *Roe, d. West v. Davis* (hh), *Doe, d. Forster v. Wandlass* (ii), 1 *Wms.'s Saunders* (kk), 5 *Rep.* (ll), *Coke Littleton* (mm), and *Shannon v. Bradstreet* (nn).

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In reply, the additional cases of *The Earl of Cardigan v. Montagu* (oo), and *Taylor v. Horde* (pp), were referred to.

(a) Vol. i. 2d edit. Page 366. — (b) Tit. Condition, O. 3. — (c) Cro. Eliz. 764. — (d) 2 Bos. & Pul. 139. — (e) 2d edit. Page 205. — (f) 3 East, 439. — (g) 4 Taunt. 213. — (h) 2 Maul. & Selw. 576. — (i) 3 Maul. & Selw. 512. — (j) 3 Term Rep. 674. — (k) Hardr. 23. — (l) Fitzgib. 207. — (m) 3 Ch. Rep. 3d edit. 56. 59. — (n) Amb. 748. — (o) 7 Ves. 506. — (p) Page 87. — (q) Hard. 94. — (r) 4 Mod. 69. — (s) 8 Rep. 154. — (t) Tit. Grant, H. 13. — (u) 2 Maul. & Selw. 525. — (z) Forr. 19. — (y) 13 East, 129. — (x) 2 East, 376. — (aa) Cowp. 819. — (bb) 3 Ves. 295. — (cc) Id. 690. — (dd) 6 Ves. 234. — (ee) 213, ss. 346, 347. — (ff) 2 Bos. & Pul. 303. — (gg) Irish Case. — (hh) 7 East, 363. — (ii) 7 Term Rep. 117. — (kk) Page 287, n. — (ll) Page 40, b. — (mm) Page 47, b. — (nn) 1 Sch. & Lefr. 66. — (oo) Sugden on Powers, 2d edit. 658. App. — (pp) 1 Burr. 40. S. C. Sugden on Powers, 625.

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At the conclusion of the argument, the Lord Chancellor, after some preliminary observations, propounded the following question for the opinion of the Judges :—

Whether, having due regard to the true intent and meaning of the indenture of the 2nd *July*, 1757, according to the legal construction of the several parts of that indenture, as stated in the special verdict, and having also due regard to the legal effect of all the facts and circumstances found by the special verdict, the demise of the 5th *September*, 1803, as the same is stated in the special verdict, is, for any, and what reasons, invalid?

The twelve Judges being divided in opinion, delivered their judgments, *seriatim*, on the 16th and 18th instant, as follows: and on the latter day, the Lord Chancellor and Lord *Redesdale* gave their opinions.

Mr. Justice RICHARDSON, after having very shortly stated the case and question as above proposed, proceeded as follows :—

I am of opinion that the lease of 1803, is invalid; because I think it is not made in conformity with the leasing power contained in the indenture of 1757. The leasing power for that class of leases of which the lease in question is one, requires “that there be contained in every such lease, a power of re-entry for non-payment of the rent thereby to be reserved;” and the question resolves itself into this,—what is the true construction of these words?—In order to decide this I must first consider, whether the words themselves import and convey any distinct meaning; and I think they do. I think they mean, that the lessor should have power to re-enter, if the rent reserved should not be paid according to the reservation.

One test, and I think a fair one, whether such meaning is conveyed by the words of this power, would be, to insert in a lease a proviso for re-entry, expressed as nearly as possible in the very words of the power itself; and then to consider

what construction a proviso so expressed, would require, and whether the meaning would be sufficiently distinct to be capable of being enforced by a Court of justice. Suppose, then, that in the lease of 1803, it had been provided, that it should be lawful for the lessor or person entitled to the rent "to re-enter for non-payment of the rent hereby reserved." In that case, would the person entitled to the rent have been empowered to re-enter, if the rent had not been paid on the days of reservation? It seems to me, that he would have been, and that without any delay or condition, other than the previous demand required by the common law; for all that he would be bound to prove, in order to justify and enforce his re-entry, would be, that there was a *non-payment* on demand, of the rent reserved by the lease.—If this be so, it seems to me to prove that the necessity of waiting fifteen days, and the necessity of proving a deficiency of distress on the premises, imposed by the proviso actually contained in the lease of 1803, are conditions not warranted by the leasing power. It has been said, that the leasing power requires only "*a* power of re-entry," much stress having been laid on the indefinite effect of the article "*a*": and it has been further said, that though such power of re-entry is to be "for non-payment of the rent;" yet, that the words "*for non-payment*" are not equivalent to "*on non-payment*," but only point at the purpose or object of the power of re-entry, *viz.* that of securing the payment of the rent. It appears to me however, that although the article "*a*" be indefinite, yet, it cannot in just construction, extend an indefinite meaning to the subsequent words, if they sufficiently import (as I think I have shewn they do) a distinct and definite meaning.

In this sentence, the word "*a*" seems to me neither to add to, nor to qualify the meaning; but that the meaning would have been the same, if that word had been wholly omitted, and the sentence had stood thus—"so as there be contained in every such lease, power of re-entry for non-

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payment of the rent thereby to be reserved." And as to the observations made on the meaning of the words "for non-payment of the rent," although it is true, that the word "*for*" does often import the purpose or object,—and so it might here, if the words had been "a power of re-entry for payment of the rent"—yet, the same word "*for*" as often imports the cause or occasion of that which is predicated: and such, I think, is its import here, where the words are "a power of re-entry for *non-payment* of the rent," meaning *on occasion* of the *non-payment*. If the words of this leasing power import (as I conceive they do), by themselves, a distinct and definite meaning, I think it follows that the fact stated in the special verdict respecting the usual and accustomed form of leases of the estate mentioned in the marriage settlement, can have no legal effect on the construction to be put upon these words. Such evidence, I conceive, is never admissible in the construction of a written instrument, unless the words of the instrument itself import a reference to something extrinsic, or unless the words involve some latent ambiguity, that is, an ambiguity not appearing on perusal of the instrument itself, but which becomes apparent on applying its provisions to the subject-matter.

The words of this leasing power, in that part which respects the clause of re-entry, seem to me to involve no latent ambiguity, nor to import any reference to any thing extrinsic; although some former parts of the same leasing power do import such reference, *viz.* where it is required that the lands to be leased for lives, should be such lands as were in lease for lives at the time of making the settlement, and that the rents to be reserved should be the ancient rents, or rents as great and beneficial.

I admit that a Court of law is bound to look at every part of a written instrument, in order to ascertain the meaning of the parties in a particular part. But I think it by no means follows, because this settlement in respect of the rack-rent leases, expresses that the tenant is to be allowed twenty-eight days for payment, that therefore it

was intended in respect of the leases for lives, to give a similar or any allowance of time, which is not only not expressed, but which appears to me to be at variance with what is expressed. Supposing, however, it were possible on this ground to get rid of the objection made against the lease of 1803, in respect of the allowance of fifteen days; another and still more decisive objection remains, viz. that this lease fetters and confines the power of re-entry to such cases only, where there is a want of sufficient distress—a condition which appears to me to be equally inconsistent with the power applicable to leases for rack-rents, and to that which is applicable to leases for lives.

The case of *Coxe v. Day* (a), which I think was rightly decided, appears to me to be in point, and I cannot draw any distinction which is satisfactory to my own mind, from the circumstance that the leasing power there allowed a period of twenty-one days for payment, whereas, the leasing power now under consideration as to the leases for lives, expresses no such allowance. It is true, that in *Coxe v. Day*, the former case of *Holley v. Scot* (b) does not appear to have been cited: and it seems, that in the last mentioned case, a similar objection taken to a lease granted under a power, was over-ruled by the Court of *King's Bench*. On what ground the Court proceeded there, we are not apprised, and being obliged now to make our election between the two authorities, I must express my concurrence with that of *Coxe v. Day*. It has been suggested, that the statute 4 Geo. 2. c. 28, though professedly made for the benefit of landlords, does, in effect, take away their right of re-entry at common law, and confine them in all cases, to the statutory remedy thereby given, which remedy can never be exercised without proof that no sufficient distress was to be found on the demised premises, countervailing the arrears then due. And I think it must be admitted, that this con-

(a) 13 East, 118.—(b) Loft. 316. See also, Mr. Butler's MS. note, ante, page 346.

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struction of the statute, if it be the true one, furnishes a sufficient answer to the second objection made to the lease of 1803; for in that case, the lease has only expressed that, which, whether expressed in the lease or not, the statute-law has provided. But I cannot think that this is the true construction of the statute. Its object, as appears to me both from the recital and enactments, was to relieve landlords from certain inconveniences, to which they were subject by the law as it then stood, and to give them certain remedies to which they were not before entitled, but not to deprive them of any remedies or rights, to which they were already entitled by law. It contains no negative or prohibitory words, which I think would obviously have been inserted, if the intention had been to deny to the landlord the future exercise of any ancient right:—And it would, as it strikes me, be a strange construction to hold, that words, apparently intended for the landlord's benefit, do, from their generality, operate to extinguish any of his ancient rights, when, if such had been the intention, it would have been so easy and so obvious to express it. That such, however, was not the intention, I think manifestly appears from this,—that whenever the new mode of proceeding in ejectment given by the statute is pursued, the statute declares, that “then and in every such case, the lessor in ejectment shall recover judgment and execution in the same manner as if the rent in arrear had been legally demanded and a re-entry made.” It refers to the legal demand and re-entry as a still subsisting mode of proceeding, not repealed or affected by the statute, and thereby shews, that the old mode of proceeding was intended to be left as it was, although the new one, if adopted, is declared to be equivalent for the purpose of obtaining a valid judgment and execution. This, I believe, has always been considered as the intent and effect of the statute:—And although I am not able to point out any case where it has been expressly decided, that the statute does not take away the landlord's remedy at common law; several have occurred, where land-

lords have so proceeded without any objection on that ground, and it has been taken for granted that they were entitled to do so. The cases of *Doe, d. Forster v. Wandlass* (a), and *Roe, d. West v. Davis* (b), are to this effect; and so is *Williams's Saunders* (c).

It has been said, that if the lease of 1803 be invalidated, the decision will shake many titles; but I have no means of knowing whether this observation is well founded, or to what extent. If such should be the consequence, I shall regret it, but I cannot feel that such an apprehension can afford a legitimate ground for deciding the present case otherwise than as the words and legal effect of the instruments now under consideration, seem to me to require.

Upon the whole, therefore, I am bound, for the reasons before given, to answer the question proposed by your Lordships, in the affirmative.

Mr. Justice BEST.—The words of the power are “and so as there be contained in every such lease a power of re-entry for non-payment of the rent thereby to be reserved.” It is impossible that words more general than those can be adopted.

I consider the law to be now settled by a series of cases, none of which are touched by the subsequent determination in *Coxe v. Day*, or any other conflicting authority, that under a general power, such as this, an absolute unconditional power to re-enter at the instant the rent becomes due, is not necessarily required. I admit, that any conditions with which the tenant for life may qualify the power to be reserved, must be reasonable and legal; but I consider that the intention of the settlor is satisfied in this case, by the power of re-entry which has been reserved in the proviso, containing, as it does, these usual and reasonable qualifications. They are qualifications from which no injurious consequences can result to the reversioner, either by lessening

(a) 7 Term Rep. 117.—(b) 7 East, 363.—(c) Page 286, n. 16, a.
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his security for the payment of the rent, or in any other respect; whilst they protect the tenant from the danger of being entrapped into an immediate forfeiture, if indeed a forfeiture could be exacted from him, so long as the rent due to the reversioner should be sufficiently secured. It has been long settled, that these qualifications, which the law will supply to any general contract, cannot be excluded but by express words; and here there are none to be found.

Nor is this a new doctrine in law, or confined in its application to subjects of this nature: it applies to every part of the law, as far as it affects human conditions. Thus, if one contract generally to deliver goods, it is not imperatively necessary that they should be delivered on the instant: all that can be required is, that they be delivered within a reasonable time. If any stipulated service be engaged to be performed, the performance of it must be intended to be undertaken within a reasonable period; and that reasonable period, again, does not, in construction, exact the condition that the contracting party shall occupy every moment of the intermediate time in the service to be performed, to the exclusion of all relaxation. All cases of this nature must be decided with reference to that common principle. If cases were necessary to support that principle, this point has been decided, and the very qualifications which are introduced into this clause of re-entry, have been sanctioned as reasonable and usual, valid and subsisting, under powers precisely similar to the present. The practice of *Westminster Hall*, and the understanding of all lawyers in all times, have uniformly recognized this principle, as well as those which I shall have occasion to state hereafter. The cases on this subject are certainly very few. I consider that *Coxe v. Day* has nothing to do with the question; and, with the strong opinion I now entertain on the subject, if I had had the honour of a seat on the Bench when it was decided, I should have differed with the Judges in that decision. Of the cases I have alluded to, the first I shall mention is that of *Jones*,

d. *Cowper v. Verney* (a). I am aware that this is a case of negative authority, the point in question not having been raised there, although the opportunity was afforded. It proves, however, when the industry and learning of the bar at that period are considered, that the objection not having been taken, it was, in their opinion, as well as in that of the Court, not tenable.

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In that case, a tenant for life had power by act of parliament to grant building leases for any term not exceeding sixty-one years "so as in every such lease there be contained a condition of re-entry for non-payment of rent:"—And the clauses of re-entry in the leases granted by him, were for non-payment of the rent in forty-two days after the day of payment. The qualification there was for a much longer period than the present, which is confined to fifteen days, and yet no objection was raised on that ground, although it was stated in the judgment that the case had been most fully argued. The reason appears to me to be self-evident, viz. that the introduction of such a qualification had been sanctioned by a practice which no argument could overturn.

The next case is that of *Hotley v. Scot*, which appears to me to have expressly decided this point. [Here his Lordship read it from the MS. note of Mr. Butler (b),] and observed, that however young he might have been at the time it was taken, he considered it to be perfectly accurate; as it bore every appearance of the care and correctness for which that learned gentlemen has since been distinguished.

Lord Mansfield there held, that the clause was a good execution of the power, although the power authorized no such stipulation in words; and his Lordship there said, "the clause of re-entry is short with words of course, and does not preclude the operation of law. A re-entry is to enforce the payment of rent; by statute, it cannot be without a want of distress." This appears to me to be a most able epitome of the law upon this subject. By "words of course," his

(a) Willes' Rep. 169. (b) See ante, page 346.

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Lordship meant such words as were generally used by conveyancers, according to a settled form in cases of that description; and he observed, that the clause of re-entry with such words, did not preclude the operation of law.—So, here, the general words do not exclude such operation, by the introduction of the usual covenants under a lease of this nature.

I use the decision in that case for a double purpose, viz. first, that it is an authority to shew that reasonable qualifications may be introduced into clauses of re-entry, when the terms of the power are general: and, secondly, that the qualification most objected to in this lease is reasonable. Besides, his Lordship adverted to the antecedent existing practice, which the counsel who argued *Jones, d. Cowper v. Verney* were apprized of, and who therefore did not raise the point in the course of their argument in that case.

The object of the clause of re-entry has uniformly been considered to be, security for the payment of rent: and upon that ground it is, that a Court of equity will always relieve against the forfeiture. In the case of *Wadman v. Calcraft* (a), the late Master of the Rolls stated that to be the principle on which the Court relieves against forfeiture for non-payment of rent; for he observed, “there is no doubt, equity will relieve against the forfeiture, considering the purpose of the clause of re-entry to be only to secure the payment of rent, and that when the rent is paid, the end is obtained.” So, in *Hotley v. Scot*, Lord Mansfield said “a re-entry is to enforce the payment of rent.” That being the only recognized available object of the clause of re-entry, and as it is impossible to shew that the introduction of the conditions inserted in this proviso at all tends to abridge or diminish the security for the rent, I hold, that it is therefore not an insufficient execution of the power given by the deed, that such qualifications should be introduced. But I mainly rely on the position, that, if the creator of a power would exclude the

(a) 10 Ves. 68.

effects of the otherwise necessary operation of law upon powers of a similar nature; and if he requires a deviation from the established forms of practice in the particular instance, it can only be effected by express words: and if there be no such words of exclusion used, all the known, the usual, and the legal qualifications may be introduced in executing the power.

To alter the regular course of law, there must be the consent of parties. In *Dormer's Case* (a), it was resolved, (long before the statute 4 Geo. 2. when the law required a demand of the rent before a forfeiture should attach) that "re-entry for default of payment of rent, without demand of it, may be by special consent of the parties." At that time, the party meaning to re-enter, must have demanded the rent at the last period of the day on which it was due, or he could not avail himself of the right of re-entry. However general, therefore, the power might be, still, the law qualified it by a necessity of making a demand of the rent; and if it should be intended that the common course of law was not to take effect, the special consent of the parties was necessary to be expressed in terms to that effect, or the operation of law upon the general contract would not have been excluded. If that were so before the statute, why, when the statute has taken away that necessity and created another, should not that other be regarded as a legal qualification, and as necessarily implied by law as the former had been? The words stated in the report of that case are, "and divers other cases were put, where consent of the parties shall alter the form and course of the law." The use I make of that case is to shew, that where a legal qualification is not expressly excluded by the parties in terms, the law attaches and has the effect of controlling and moulding their general contracts. In this power, as created by the deed, there is nothing expressed to exclude the operation of law, and the established practice of *Westminster Hall*; and the Courts have always held these

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(a) 5 Rep. 40, b.

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qualifications adopted in the common forms of assurances in use with conveyancers, to be reasonable and proper. Then the case of *Hotley v. Scot* is a positive authority in favour of the introduction of such conditions, and is not in any degree, negatived by that of *Coxe v. Day*. The Court there, did not give such a judgment as has been assumed in the course of this argument. Two of the Judges (Lord *Ellenborough* and Mr. Justice *Bayley*) who delivered their opinions in that case, have since supported the determination of *Hotley v. Scot*, by the judgments which they have pronounced in the present, in the same Court, and which, I consider, is not affected by the decision in *Coxe v. Day*. Lord *Ellenborough*, indeed, while that case was arguing, threw out incidental observations, apparently militating with the doctrine of *Hotley v. Scot*; but it is not fair to hold a Judge bound by the occasional remarks which proceed from him in the course of a discussion, and which are often mentioned merely for the sake of fixing the attention of counsel, or giving a new direction to the course of the argument. It is only from the ultimate decision in that case, that any principle of law can be fairly or properly deduced. The case of *Coxe v. Day* is, however, very distinguishable from the present, and from *Hotley v. Scot*, and in this very material respect:—There was a qualification introduced into the power of re-entry in the lease, which was the subject-matter of the argument in the former case, by the creator of it, by which the landlord would have been deprived of the benefit of the statute 4 Geo. 2., and the tenant would have had all the undue advantage of the difficulty attending the old necessity of making a demand of the rent, with all the formalities which that statute was meant to extinguish. The words of the condition of the power in that case are, “so as in every such leases there be contained a condition of re-entry for non-payment of the rent reserved, by the space of twenty-one days.” So far, the proviso for re-entry pursues the words of the power, and if it had stopped there, it would, perhaps, have been

held sufficient, as it might then have been said, that it was a specific power—it prescribed all the terms which the creator of it meant should qualify the right of re-entry, according to the rule, that *expressio unius est exclusio alterius*. But the distinction on which I rely, is the introduction of the words “*being lawfully demanded*,” between those words and the other member of the condition, that no sufficient distress can be found upon the premises. In that case unquestionably, the proviso in the lease was not, in that particular respect, in conformity with the power in the deed; because, by inserting the words “*being lawfully demanded*,” such a condition was not only not warranted by the law, but it was contrary to it, casting on the landlord a burthen and difficulty, from which an express statute had been passed for the purpose of relieving him. He would be, by such condition, thrown back into the difficulties from which the statute had extricated him; he must, in that case, have watched from the particular day on which the rent should become due, and have made the demand, as formally, at sun-set, with all the formalities which had been dispensed with by the new law.

The rejection of such a condition, indeed, is fully consistent with the principle that the landlord's right shall not be clogged with difficulties beyond the law. That case, therefore, I consider as being very distinguishable from the decision in *Hotley v. Scot* in that respect; and for that reason, it is not a conflicting determination; and I think the latter, confirmed as I have shewn it to have been, abundant authority for the decision of this question in the negative. Another principle to be considered in forming an opinion in this case, is furnished by that of *Opey v. Thomasius* (a), viz. that “powers are to be expounded according to the intent of the parties,” as was said by Mr. Justice *Twisden*,—a rule recognized more fully in *Goodtitle*, d. *Clarges v. Funucan* (b), where Lord *Mansfield*, in giving the judgment of the Court,

(a) Sir T. Raym. 132.——(b) 2 Doug. 565.

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said, " Powers are now a common modification of property in land, and as such, are to be carried into effect according to the intention of those who create them"(a).

If, then, the sole legitimate power to re-enter, which is now only a common modification of the enjoyment of real property, be to secure the payment of rent; and if the intention of the party exacting the introduction of such a power, is to be regarded in construing the terms of it—can any man doubt that the intention of the creator of the leasing power in question has been fully satisfied by the clause for re-entry inserted in the proviso for that purpose in this lease? It has merely for its object to secure the rent, and that is the only legitimate purpose of it. If an absolute forfeiture of leases was to be the immediate and inevitable consequence of non-payment of the rent reserved, on the day it became due, it would be a consequence most prejudicial to the tenant, to the landlord, to the remainder-man, and to the public; for it would tend to discourage the cultivators of land, and create a neglect of property, injurious to all parties, and to the community at large, if forfeitures were to be rigidly exacted without regard to circumstances. But would the conditions attached to this power of re-entry, defeat in any respect, those, or any fair views of either party to whom it related, and for whose interest it was intended? Certainly not, and therefore I say, if the intention of the parties is to be attended to, I consider that this lease is a sufficient execution of the power. But whether I am right or not in the view which I have taken of this question, I have done enough to establish the validity of the lease, if I have brought the case into doubt and difficulty;—and that it has been brought into doubt, is apparent from the various and protracted discussions which it has occasioned, both in the Courts below and in this House. I should be one of the last to advise your Lordships, as a Judge, that established rules of law should in any case be broken in upon, out of regard to any

(a) See 2 Doug. 575.

considerations resting upon equitable grounds; because I am aware that great iniquity is always the consequence of every such deviation from those rules. But when the equity of a case consists with the law arising upon the circumstances of it, as far as any settled principles of law can be found to apply, rigid strictness should not be insisted upon. Equity is naturally engraven on the hearts of all men, learned and unlearned. Every one may see the palpable equity and the justice of this case. In doubtful matters, consequences may be weighed: and I have frequently heard the most eminent Judges say of particular cases pending before them, in which they have felt themselves fettered by the ancient usage and course of practice, that if they were new, they would decide them according to the reason and equity of the circumstances; where not inconsistent with the rules of law: and I consider it to be sound legal reasoning, that established principles are not to be shaken.

But in this case, the established practice and the weight of authorities are decidedly in favour of the obvious reason and justice of it; and if it were not now to be decided agreeably with that established course, the determination would shake the titles of every person in the kingdom, who is in the possession of valuable estates held upon leases under such powers as the present. An immense proportion of the landed property of this country, is granted out by tenants for life upon leases of this sort for valuable consideration, and this lamentable consequence would follow, that claims for indemnity to an enormous amount would be set up against funds which may have been long ago raised by the provident care of a prudent father, to secure provisions for the younger branches of his family; and the grantees of valuable leases, fairly purchased, might on a sudden be turned out of possession of their estates for a mere error in the framing of the instrument; although the form should be consistent with the long-established precedents which have been followed in all practice. These leases are granted to a very great extent all

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over the *West of England*, where this practice of settling estates particularly prevails. The estate of many a family, therefore, in that part of the country, depends on the validity of such demises: and I have reason to know, from means afforded me by my situation as Judge upon that circuit, that similar attempts have been already made to take advantage of similar objections. I should therefore be disposed to hold, that it would be sufficient to support such leases against such objections, that there should be any doubt upon the question; and that there are doubts of very considerable magnitude, the experience of this case abundantly shews. My opinion being, that the lease in question is valid, makes it unnecessary for me to say any thing upon the point which has been raised as to the admissibility in evidence of the former leases; this power being general, and the proviso for re-entry contained in the lease having in it nothing unreasonable or inconsistent with the terms of the condition upon which it was to be exercised: I therefore feel myself bound to answer the question which has been proposed to us by your Lordships, in the negative.

Mr. Baron GARROW.—The settlement made upon the marriage of Lord *Vernon* with Lady *Louisa Barbara* his wife, on the 2d *July*, 1757, on which this question arises, gives a power of leasing, requiring, with respect to property of the nature in question, that there shall be contained in the lease “a power of re-entry for non-payment of rent.”

In this power, no time is specified by way of indulgence to the tenant as to the payment of the rent, after the day on which it shall fall due, nor are any other terms required, than that the person who from time to time shall be in possession of the estate, shall insert in the lease a power to resume the possession for non-payment of the rent. The lease granted by Lord *Vernon* to the defendant and another, contains a clause for re-entry, if the rent shall be in arrear for the term of fifteen days, and if there shall be no sufficient

distress upon the premises to satisfy the rent;—and the question is, whether this is a good execution of the power, or, in other words, whether this is such a power of re-entry as was required by the creator of the settlement? It is observable, that the creator of the power, or those who advised her, knew how to make distinctions as to powers of re-entry applicable to different estates, and in the case where the rent reserved is of the most valuable description, there the creator of it only requires of those who shall come in succession into the possession of the estate as tenants for life, that they shall, for the preservation of the estate in the most beneficial form and extent, for those who shall be from time to time interested as reversioners, insert a provision, that if the valuable rent reserved on leases for years absolute, shall not be paid for twenty-eight days, then there shall be a right to enter at the expiration of those twenty-eight days.

In the case of the render of 2*l.* a year, and a couple of fat capons, or 1*s.* 6*d.*, at the option of the lessor, it is insisted, that the power of re-entry should be altogether absolute and unconditional, and that, at the first moment when the day has expired on which the money is demandable, the power of re-entry is to attach, and enable the reversioner at that instant to turn the person out, who, upon a valuable lease for years determinable upon lives, should have permitted the day to expire before he had paid his sum of 2*l.* I admit, that if the maker of the settlement had in express terms said, the power shall be to re-enter the moment at which the rent is due, and not paid or tendered, a Court of law could not alter, but must execute such power so expressed.

We must see whether the power in question has been complied with or not.

The terms of the condition in the settlement are, that there shall be contained in the leases a power of re-entry for non-payment of rent. Is there not in the lease granted to

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the defendant, a power of re-entry for non-payment of rent ? There is ; but it has been urged with great force, that it is not such a compliance with the power, as the reversioner had a right to expect the lessor should have made, for he has clogged the clause of re-entry with a delay of fifteen days, and also with the necessity of seeing that there is no sufficient distress upon the premises. The answer to this appears to me to be, that according to our experience, such an event is so unlikely, that it probably did not occur to the maker of the power to guard against it, and not having in express terms required any particular form or terms of the clause for re-entry, I think the power is satisfied by that which has been inserted in the lease in question, and consequently that it is not invalid.

Mr. Justice BURROUGH.—Since the judgment was given in this case, in the Court of *Exchequer Chamber*, I have paid the closest attention to the subject. I have, over and over again, weighed in my mind the various facts and circumstances contained in the special verdict—and have earnestly endeavoured to discover whether I had formed an erroneous opinion, when I concurred in that judgment.

After the fullest deliberation, I am of opinion, that the demise of the 5th *September*, 1803, is invalid—that it was valid only during the life of the lessor ; and that his death determined the estate of the lessee.

The statute 4 *Geo. 2. c. 28.* was relied on in the *Exchequer Chamber*, and in the argument before your Lordships, as bearing on the question. In my view of this case, it has no application to the subject now before the House. That statute (as I conceive), applies only to leases which, before it was passed, might and must have been avoided by entry—to cases where the cause of avoidance might have been waived. Such leases were valid till a strict legal entry was made, and before such entry, they were capable of confirmation by suitable acts done by him in whom the right of re-entry was ;

but a lease by a tenant for life, having a special power to demise, if not made conformable to the power, is the lease of a mere tenant for life, and has validity only during his life, and not a moment longer. I cannot see that any well-grounded argument, from a provision made by an act of Parliament, in the case of demises of a description wholly different from the present, can be urged in support of that demise. In forming our judgments on the question submitted to us by your Lordships, we must consider that we are required to give our opinions on the construction of a deed.

There are certain rules of the common law which must govern us on such an occasion. One is—that the construction must be made on the whole deed. The principle of the common law is, that *Ex antecedentibus & consequentibus est optima interpretatio* (a).

There is another rule which also strongly applies to the case in question—and that is, *Quoties in verbis nulla est ambiguitas, ibi nulla expositio contra verba fienda est*. Acting on these rules, I contend, that there is no ambiguity in the words of the power, and that it is manifest from the various parts of the deed of the 2d July, 1757, that it was the intention of the parties to have those words understood as they are written, and without addition.

The clause of re-entry in the demise, ought, I contend, to have corresponded with the *reddendum*, which is to this effect, “Yielding and paying the yearly rent of 2l. at Michaelmas and Lady-day, by equal portions,”—and not so corresponding, I am of opinion that the lease is invalid, first, Because there can be no re-entry, unless this rent is behind or unpaid, for fifteen days from Michaelmas and Lady-day, which is an extension of the time beyond that in the *reddendum*. Secondly, Because the re-entry for non-payment of the rent, cannot, by the express terms of the demise, be made, if there is sufficient distress to be had on the pre-

(a) Shep. Touch. c. 5. rule 4, Page 87.

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mises. The general scope of the deed is too well known to require repetition.

It has heretofore been considered, that there are three distinct powers in this deed. I conceive, that correctly speaking, there is only one power, consisting of three distinct parts. I say this, because the enabling words, "that it shall and may be lawful, &c." are placed at the head of the whole, and are not afterwards repeated—and the other parts are introduced by the words "and also." It appears to me, from this mode of looking at the deed, that it may be fairly collected, that the framers of it must have had their minds directed to the different parts of the power—and must have designedly and deliberately introduced an additional restriction in that part of it which relates to leases for years, and references in other parts to extrinsic matters—and designedly and deliberately omitted any such additional restriction in the part of the power in question, and also all words of reference to extrinsic matter or former leases. The first part of the power is that which relates immediately to the demise in question. By this, Mr. *Vernon* and his wife (who by the deed took successive estates for life), are enabled to grant leases for life, or years determinable on the death of a life or lives, of such lands as at the time of the deed were leased for life or years determinable on the dropping of a life or lives;—so as the ancient and accustomed yearly rents, duties, and services, or more or as great and beneficial rents, &c. be reserved or made payable; and so as there be contained in every such lease a power of re-entry for non-payment of the rent thereby to be reserved. Now, what is the rent thereby to be reserved, but the rent in the *reddendum*? The power of re-entry is to be for the non-payment of that rent. If it was not paid at *Michaelmas* or *Lady-day*, I contend that it is plain, by the very terms of the deed, that the right of re-entry ought to be complete.

It is not to be doubted, that former leases were admissible

in evidence—for two purposes. First, to shew what lands were, at the time of the demise, leased for life or years, as described in the deed; secondly, to shew what the ancient and accustomed rents were;—for former leases are for those purposes necessarily referred to. But it appears to me to be free from doubt, that as to the power of re-entry prescribed by the deed, there is no reference to former leases, or to prior circumstances, but to the *reddendum* only—ascertaining not only the rent itself, but also the mode and time of payment. This power of re-entry, prescribed by the deed, is framed in plain terms—it contains a clear proposition in itself—and therefore I contend, that the maxim, that *Quoties in verbis nulla est ambiguitas, ibi nulla expositio contra verba fienda est*, is precisely applicable to this point. Thus to decide, is to avoid the vicious mode of interpretation which is reprobated by a maxim to be found in Lord Bacon's Tracts<sup>(a)</sup>, *Divinatio non interpretatio est, quæ omnino recedit a literâ*. If you stir beyond what the deed expressly prescribes, then commences the *divinatio*—and the *interpretatio* is at an end.—Next, follows in the deed what I say is more properly a second part of the same power, than a distinct and separate power—the general enabling words being at the beginning of the whole. This part is connected with the former by the words “and also,”—“and also by indenture to demise any of the lands in the settlement, for any term not exceeding twenty-one years in possession: so as there be reserved as much, or as great and beneficial yearly and other rents as were then yielded, or the best and most improved yearly rent or rents as can be reasonably had or obtained; and so as in every such lease for an absolute term of years (thus distinguishing this form from the former leases), there be contained a clause of re-entry, in case the rent or rents thereupon to be reserved, be behind or unpaid for the space of twenty-eight days after the times thereby respectively appointed for payment, there-

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(a) Folio 47.

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of." This part of the power, which is, as it were, uttered in the same breath with the former part under the same enabling words, and united to them by the words "and also," affords very important observations.—First, the rents to be reserved in these leases are to be as *much*, or as great and beneficial, as were then yielded. Here, therefore, is a plain reference to the then existing state of rents. To prove this, the former leases were good evidence. Or secondly, the rents are to be the best and most improved that can be reasonably gotten. This admits too of reference to extrinsic matters. The third observation is, as to the clause of re-entry prescribed by this part of the power, in case the rent be behind or unpaid for twenty-eight days. With great deference to the judgment of those who entertain a different idea, I cannot refrain from expressing my strong opinion on this part of the deed. In my mind, it affords an argument of irresistible weight—that the parties to this deed, intentionally omitted an extension of the time of payment in the first part of the power, under which the demise in question is contended to be valid; and that they intentionally inserted the extension of twenty-eight days in the second part. And I confess I feel myself alarmed for the fate of men's deeds—if it shall be holden by your Lordships that the demise in question is valid, which contains an extension of the time of payment of the rent to fifteen additional days—not hinted at in the power itself, and inconsistent with the *reddendum*; and which also contains a provision which deprives the reversioner of his re-entry, if on any part of the premises there may chance to be a sufficient distress. That the clause of distress imposes a difficulty on the reversioner, is proved by the case of *Rees, d. Powell v. King*, which was tried before Mr. Justice *Heath*, at *Hereford*, in 1800, whose opinion was ratified by that of the Judges of the Court of *Exchequer*, in the following Term (a). It was there held, that a clause of forfeiture in a lease, in

(a) See *Forr.* 19.

case no sufficient distress was to be found on the premises, must be pursued strictly, and every part of the premises must be searched. The third part of the power is introduced in the same manner as the second. This is the part which empowers the leasing of mines then open, or lands whereon persons may be willing to open mines. Annexed to this, there are several restrictions running in this language :—" So as in every such lease there be reserved or made payable such parts of the lead, copper, ore, coal, and other produce, to be gotten from the said mines, or such other yearly rent or income in respect thereof, as can be reasonably had or gotten for the same, without taking any fine, &c. ; and so as the lessees execute counterparts ; and so as there be inserted such proper and usual covenants for the effectually working the mines, &c. and doing all proper and necessary acts, as are usually inserted in leases of the like nature." It is to be observed, that with respect to those leases, there are special restrictions peculiarly applicable to them. The parties to the deed had all the parts of this power before them, and have cautiously introduced restrictions applicable to each part—and can a Court of law add to these restrictions ?

The rents of the mines, or the parts of the produce to be reserved, are to be such as can be reasonably gotten ;— the covenants are to be the usual covenants for effectually working them, and doing all necessary acts. In the second and third parts, the word "*reasonably*" is introduced ; but it is wholly omitted in the first. Is a Court of law authorized to transplant the word "*reasonable*" to the first part, when the parties have introduced it in the second and third, and omitted it in the first ? I humbly submit that this cannot be done, if it varies the construction of the words, as the parties have penned them.

We are required to state to your Lordships our respective opinions, " Whether, having due regard to the true intent and meaning of the indenture of the 2d July, 1757, according to

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the legal construction of the several parts of it, and having due regard to the legal effect of all the facts and circumstances found by the special verdict, the demise is, for any and what reasons, invalid?"

I feel, that if I depart from the plain meaning of intelligible words, made, (if it were possible), more plain by the context matter, I shall be at sea without a compass. If the demise in question had contained a power of re-entry, framed in words literally corresponding with the power in the settlement, I conceive it would have been good. I have heard no valid objection to such a power of re-entry.

Notwithstanding the most earnest attention to the subject, before and since the arguments in the *Exchequer Chamber*, and before your Lordships, I have not been able to raise in my mind a doubt of the fitness of such a clause, or of its being that which the parties intended. For the reasons I have stated, I am of opinion, First, that the former leases were not admissible in evidence, to shew that they contained clauses similar to those to be found in the demise in question, respecting the extension of the time for payment, and respecting the distress. Secondly, that the demise in question is invalid. The House has been told at the bar, that a decision, that this demise is invalid, will have the effect of destroying other leases made under similar powers. I cannot take notice of such a statement:—First, because it is an assertion of a fact, of which, as a Judge in a Court of law, I can have no knowledge. Secondly, if it were fit that it should weigh with us, ought we not to see the settlements and the leases, in order to know that the *antecedentia et consequentia* are the same as in the case before your Lordships? A variation in the words and context-matter, might vary the grounds of our judgment. Thirdly, if there were other leases made under circumstances precisely similar to the present, it would not vary the opinion I have formed. I cannot accommodate my sentiments to the convenience of lessees under powers. Their estates must stand or fall by the authority under which

they were made. It is a maxim of our law, that it is better to suffer a mischief than an inconvenience. The mischief (if it be any) we can see the extent of. It will be, that certain demises, in consequence of the carelessness or ignorance of those who drew them, will be invalid, and they who were intended to take, in the event of there being no good subsisting leases, will take. On the other hand, no one can foresee the end of inconveniences which would arise from the relaxation of the rules of law in the construction of deeds of this description.

I have only a few words to add, as to the cases of *Hotley v. Scot* and *Coxe v. Day*. From the report of the first (a), I cannot discover what was decided. It is to me unintelligible. But supposing it to be applicable to the present, we have, in the later case of *Coxe v. Day*, the decision of four learned men on the question, as to the sufficiency of the disteess, which has great weight with me; and I cannot see why it ought not to guide our judgment on the present occasion. It is well known, that the late Lord Chief Justice of the *Common Pleas* (Sir *Vicary Gibbs*) thought that decision right, and was of opinion that the present lease was invalid. He presided in that Court when the present case found its way into the *Exchequer Chamber*.

Mr. Justice HOLROYD.—I think, that having due regard to the true intent and meaning of the indenture of the 2nd *July*, 1757, according to the legal construction of the several parts of that indenture, as stated in the special verdict, and having also due regard to the legal effect of all the facts and circumstances found by such verdict, the demise of the 5th *September*, 1803, as the same is therein stated, is invalid.

By the death of Lord *Vernon*, the lessor, who had an estate in him for life only, that demise became invalid, unless it were made in conformity to one of the powers of leasing contained in the above-mentioned indenture of the 2nd *July*, 1757. That indenture contains three powers of leasing: one for a

(a) Loft. 316.

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life or lives, or for years determinable on a life or lives; another for years, not exceeding twenty-one; and the third for working mines, or ore, for years not exceeding thirty-one.

Each of these powers is clogged with qualifications of two descriptions; one class of which is comparative, or with reference either to the existing or previous state of things, or to usage or custom, or to what can reasonably be had or obtained; the other class is direct and absolute, without any reference or regard either to the existing or previous state of things, or to usage or custom, or to what can be reasonably had or obtained, or to any matter whatever. These last qualifications are superadded by the creatrix of the power, to be complied with at all events, as I think, without reference or regard to any matter, and not to be varied, changed, or altered by, or at all to depend upon any usage or custom, or state of things, or any matter whatever. The first of the above powers of leasing is that upon which the present question depends—the power of leasing for a life or lives, or for years determinable upon a life or lives. The qualifications with which that power is clogged, are, as to the reservation of the rents, duties, and services, that they be such as were the ancient and accustomed, or more, or as great or beneficial as at the time of the demising were payable, or as much as a just proportion thereof amounts to, according to the value of the premises demised, or more, with the exception of heriots. These qualifications are comparative, or with reference expressly to the things there expressed, and must be such as, on such comparison or reference, shall be found conformable thereto, and are wholly dependent thereupon. But the other class of qualifications superadded to this power, is direct and absolute, and without reference to, and wholly independent, as it seems to me, upon any other matter, except what the law requires, and to be complied with at all events, whatever may be, or may have been, any usage, custom, or state of things whatever. These other qualifications are, that the rents, duties and services, be incident to, and go along with the reversion and remainder; that

the leases contain a power of re-entry for non-payment of the rent reserved; and do not contain any express clause, freeing the lessees from impeachment of waste; and that such lessees seal and deliver counterparts of the leases. It is upon one of these direct, absolute, and independent qualifications of that power, that the present question has arisen.

That qualification is in the following words:—"so as there be contained in every such lease a power of re-entry for non-payment of the rent thereby to be reserved." This qualification being expressed in words that are direct and absolute, and without reference to any former leases, or to any prior or then existing state of things, or former management or disposition of the property, the fact found by the Jury, with respect to the former leases, cannot, I think, vary the legal construction to be given to this qualification. There is no latent ambiguity in the words, which those former leases either raise or remove. If the words be not clear and explicit in themselves, their ambiguity, if any, is upon the face of the deed itself; and they cannot, I think, by law, be allowed to crave in aid any former usage to vary or alter their construction; and this more especially, in the case of such a deed as the present, wherein the parties expressly direct that a reference to the then existing, or to former usage should be had recourse to, where they intend that either of them should be called in aid on the subject-matter of these qualifications. Besides, it has been held by the Court of *King's Bench*, in *Iggulden v. May* (a), as well as by the Lord Chancellor in the same case (b), (ratifying a similar doctrine that had before been held, both by Lord *Alvanley* and Sir *William Grant*, when Masters of the Rolls, on covenants for the renewal of leases,) that the construction of deeds cannot be varied by the acts of the parties; and therefore, various other leases that had been before successively made by the owners of the inheritance for the time being, could not be taken in aid to construe the meaning of a covenant for renewal. The in-

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(a) 7 East, 237. — (b) 9 Ves, 329.

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stability and uncertainty introduced into rights of property created by deed, by letting in such extrinsic evidence, and the mischiefs arising therefrom, would apply equally, as it seems to me, to this case.

The present question arises in a case where the exercise of the power is by a person (*viz.* Lord *Vernon*) who, previous to the creation of the power, was a stranger to the estate; and in a case where this qualification of the power given to him by his wife, must be taken to have been inserted, as well for the benefit of herself as of the several other persons in remainder, in derogation of whose rights his exercise of the power would operate, so long as the lease should continue valid after the extinction of his own life estate. It would operate in derogation of her and their rights, by depriving them successively, of the actual occupation and enjoyment of the demised premises themselves, which they would otherwise be entitled to have, and giving them successively, in lieu thereof, a rent or rents, such as the power required, however inadequate the same might be. The power given to the tenant for life to lease for a term that may last beyond his own life, is agreeably to what is said by Lord *Ellenborough* in *Coxe v. Day* (a), "for the benefit of the tenant for life; the qualifications only, (as he there also says) are for the benefit of those in remainder":—and in this case, those in remainder, who are to be protected by these qualifications, except the creatrix of the power herself, are not parties or privies, but are strangers to the deed; and therefore, as to them, the words of the deed are to have their full operation for their protection against the tenant for life who executed the power;—and against whose act, which would or might be to their detriment, they were to be protected by this qualification.

The very intent of prescribing these requisites is to protect the several remainder-men from the discretion of the tenant for life, in the exercise of this power of leasing given to him.

(a) 13 East, 127.

The object of the qualification is to secure to them the rent only, and not to give them any substitute whatever in lieu thereof, other than and except the land itself upon which the rent was to be paid. For this purpose, this qualification looks to and specifies some occasion or event, and that, a simple unqualified one, *viz.* the non-payment of rent, not under any particular circumstances only, but generally, whenever there is a non-payment of rent; that is to say, it looks to and specifies the default of the lessees by the non-payment of the rent, as the occasion or event on which those who are entitled to the rent to be paid for the land, shall, for want of the rent, have the land itself—the *quid pro quo* the rent was to be paid. Whenever that event or default arises, the case then exists, I think, on which the land was to be had for that default, without any other matter being to be superadded thereupon, except what the general rules of law, independently of particular terms of contract, would require;—such as those requiring in a particular manner and form, a demand of the rent due.

The words applying to the power of re-entry required to be contained in the lease, are “a power of re-entry for non-payment of the rent thereby to be reserved,” that is, as I think such a power as will authorize the party whenever there is a non-payment of the reserved rent, to re-enter. That is the express cause, on account of which he is to be at liberty to re-enter, which liberty must, I think, be co-extensive and co-existent with that cause: and that cause (which is non-payment of rent—such, I mean, as will authorize a re-entry) exists from the very instant that there is such a default of payment as the law requires to authorize a re-entry: and that default of payment equally exists from the moment of such a demand being made of the rent due, and non-payment thereon, without any subsequent definite period of time having elapsed; and whether there be or be not distrainable goods on the premises, sufficient to satisfy the arrears of the

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rent, and by the sale of which the remainder-man may, at his own trouble and risk, pay himself those arrears. The words "for non-payment," must, in this case, I think, be taken to mean the same as either "because of", "by reason of", "on account of", or "in case of" non-payment; that is to say, when that event occurs; and the same therefore, as if the words were "*on* non-payment of rent." That appears to me to be the proper sense and meaning of the words; and it is also, as I think, agreeable to the object of the qualification, which is, that the party shall have the land, whenever the lessee fails to pay the rent for it. The lessee's failure or default in the performance of a duty, which it is incumbent upon him to perform, is the sole ground and consideration for entitling the party to re-enter and have again the land, without regard to any possibility or power the rent-owner may have to obtain the rent, by any other means or exertions of his own. But it has been argued, that this qualification, in requiring a power of re-entry, is silent as to the time when it should be carried into effect, and therefore, that it may be considered to require only that there should be some reasonable power of re-entry for non-payment of the rent; and that the power of re-entry reserved upon the lease in question, is a reasonable power of re-entry for non-payment of the rent; and therefore as much as the creatrix of the power has required. To this, (besides observing that the word "reasonable" is not here used in the deed, though it is used in two other instances in giving those powers, where a discretion was intended to be given) I answer, that this qualification, in my opinion, is not to be so considered, if, upon the due and proper construction of this leasing power, if fully executed, it would have authorized a re-entry for non-payment of rent in any case, in which such re-entry would not be authorized for non-payment of rent upon the lease in question. And I say that there are cases, in which, if the power of leasing had been fully executed, a re-entry might

be lawfully made for the non-payment of rent, in which it could not lawfully be made for such non-payment under this lease.

To try whether this be so or not, suppose the right of re-entry reserved by the lease, instead of being in its present form, had used the very words of qualification used in the deed creating the power of leasing. Suppose the words in the lease had been "Provided that it shall be lawful for the lessors, &c. to re-enter (or 'that they shall have power of re-entry') for non-payment of the rent hereby reserved." That is an easy and obvious way of framing the proviso, and most likely to be adopted, as I should think, by a person having recourse to, and looking at the leasing power, as he ought to do, who is anxious to be secure; and that, clearly, I think, would have been a due execution of the power: and under such an execution of the power, by using those words in the lease, whenever there was a default of payment of the rent, whether fifteen days had elapsed or not since the rent became due, or whether a sufficient distress was on the demised premises or not, the right of re-entry would have arisen, in case the landlord had made such a demand of the rent as the law for that purpose requires: so that the same construction would be given to those words, where used in the lease, as if the words had been "on non-payment of rent;" whereas, according to the right of re-entry actually reserved, the landlord has no such right of re-entry (though the rent is due, and has been so demanded) for fifteen days, during which he would have such a right, under such a due execution of the power of leasing, as I have supposed:—nor would he have such right of re-entry at any period of time, when there was a sufficient distress on the premises, on which he might levy for his rent, though upon the goods of innocent third persons, which right of re-entry he would have during all that period in the other instance, and without the painful necessity of being driven, in any case, to his remedy by distress upon the goods of innocent strangers. So that he has not that right and

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specific remedy in lieu of his rent in those cases, under the lease in question, which he would have had under it on such a due execution of the leasing power as I have above supposed; but a different one, and such, as in some of those cases at least, some conscientious persons would not resort to or enforce—such as enforcing the power of distress upon innocent third persons. The construction of the words in question, therefore, if used in a lease instead of being used in a leasing power, taken according to the proper and ordinary sense and meaning of the words used, would, as it appears to me, have given a right of re-entry immediately on non-payment of the rent. They cannot, therefore, I think, be properly deemed to have a different import and signification, when used in the leasing power, from that which they would have had when used in a lease made in conformity to that power; or than they would have, if they were used in any lease whatever. There is not only no right of re-entry given for non-payment of the rent, until a default of payment for fifteen days; but even on such default, the right given by the proviso is not a right of re-entry to possess or enjoy the land, but a right only of distress in case there be a sufficient distress upon the premises. In the forms of leases contained in *Horseman's Conveyancing*, in the edition that I have, I have been able to find only one that is clogged with the insufficiency of distress; all the others appear to be without it. Those leases appear to have been made between the times of the statutes of *Will. & Mary*, and *Geo. 2.* and several of the conveyances there, for securing annuities, give, first a power of distress in case the annuity be in arrear for a given number of days, and a right of re-entry and enjoyment, till satisfaction, in case it be in arrear for a larger number of days, without regard to whether there be or be not, any sufficient distress upon the premises. I think, too, that it affords an argument in favor of the above construction, and that nothing else can be legally deemed to have been in the contemplation or intention of the creatrix of the leasing power,

when she used the words in question, than a mere simple non-payment or default of payment of rent *generally*, unaccompanied with any other fact or circumstance, except that which the general rule of law requires, *viz.* a demand. It is manifest, that when she meant that any other fact or circumstance should accompany that non-payment, before the right of re-entry should be given, she has expressly mentioned it; for in the second leasing power, she enables leases to be granted, though the right of re-entry be not reserved, except upon a lapse of non-payment for twenty-eight days after the time appointed for payment of the rent; and I do not see how the lease in question can be held to be valid, except upon principles of law that would have rendered it also valid, in case the creatrix of the leasing powers had also expressly added in the second leasing power another ingredient besides that lapse of twenty-eight days, *viz.* the want of a sufficient distress upon the premises, without both of which, in addition to the mere non-payment of rent, a right of re-entry need not in that case, have been reserved under the second leasing power. But, in truth, the reserved right of re-entry which is now in question (whether it is to be deemed reasonable or unreasonable), is not a right of re-entry for non-payment of rent, but is a right of re-entry for a different thing, which may never exist, notwithstanding there is a default of payment of rent, *viz.* for an aggregate, consisting in part, indeed, of that default, but of two other things besides, *viz.* a certain lapse of time, and a want of sufficient distress. It is, in reality, not a right of re-entry for non-payment of rent, but a right of re-entry for want of a sufficient distress in case of such non-payment. Instead of giving a right of re-entry for non-payment of rent, it refers the remainder-man to the right of distress on that event—a right which he would have been entitled to by the general law, even without such reference; and it gives him the right of re-entry only at a later time, for a different thing, and on a further event, *viz.* the want of a sufficient distress. It is not,

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therefore, in reality, a right of re-entry for the same thing which the creatrix of the leasing power required it should be for (and which right, as I have said before, must, I think, be co-extensive with the existence of the thing, or event, or default, for which it was given), but it is a right of re-entry for a combination of things, all of which must exist, before the right of re-entry can be exercised; and how reasonable soever it may be thought, that this qualification of the leasing power might have been given by its creatrix for the securing of the rent, instead of the qualification she has actually given to it; it cannot, I think, be substituted for the qualification which she has actually given and required.

But it has been argued, that all this is immaterial, because of the general clause of re-entry that follows, for default of performance of any of the reservations, covenants, &c. But it is so completely settled, both on the maxims and authorities of law, that the general clause of re-entry can only extend to cases not before specially provided for; more especially when it would otherwise contradict and defeat the prior express provision, that I shall say no more upon this point.

It has been further objected, that this leasing power being given and executed since the statute 4 Geo. 2. c. 28. s. 2. the insertion of the want of a sufficient distress on the demised premises in the lease, in order to give the right of re-entry, has become immaterial, because, (it has been urged), that since that statute, no right of re-entry for non-payment of rent can be rendered effectual, so as to regain the actual possession, unless where there is no sufficient distress to be found on the demised premises countervailing the arrears of rent due. But that statute does not appear to me to make any difference in the present case; it applies only to cases where the landlord has omitted to make such a demand of the rent as would entitle him to the forfeiture, and substitutes for his relief, other things to be done in lieu, and then gives him the benefit of a forfeiture, to which he would not otherwise be entitled; and it gives him that benefit only

in certain cases, amongst which is the want of a sufficient distress, and on certain terms. But notwithstanding that statute, when a due demand of the rent has been made, a right of re-entry may be given, and effectually enforced, though a sufficient distress be upon the demised premises. That statute, too, applies only to cases where half-a-year's rent is in arrear, and not to those where a less arrear of rent is due, as may be on the lease in question, by a part-payment, although the rent is not reserved quarterly, but half-yearly.

It has been further urged, that not only the above statute, but all the cases both at law and in equity, shew that the object of a power of re-entry is only to secure the payment of the rent. It was then contended, that this payment of the rent is as effectually and beneficially secured by the power of re-entry actually reserved in the present case, as if that power had been in the words used in the leasing power; inasmuch as it is said, that it reserves the right of re-entry in all cases where the landlord cannot himself by a distress, obtain the payment of the rent. This, it was argued, appears by the necessity there is (even after entry) of obtaining judgment and execution in an action of ejectment, before possession can be obtained, and by the relief, which the Courts, both of law and equity, but more particularly the latter, give, independently of the provisions of that statute, in cases of forfeiture for non-payment of rent. But let us see how the case stands as to this point. If the right of re-entry reserved had been merely for the non-payment of the rent in the terms of the right of re-entry required by the leasing power, I think it is clear, that on a due demand of the rent being made (and by the statute 4 *Geo. 2.* even without such demand where half-a-year's rent remains due,) the landlord would have been entitled either to have the rent itself actually paid to him, or to have the land. No other act in that case need be done, nor any trouble or risk undergone by him with regard to the rent; but without further act, trouble,

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or risk on his part, he might immediately enter into the land, or immediately proceed to recover the possession thereof by an action of ejectment, against which the tenant could not get relief without his paying the rent itself with costs : and unless he thus gets such relief, the landlord would be entitled to recover all the mesne profits from the time of default by non-payment of the rent. The right of re-entry actually reserved in the present case, gives him no power to re-enter or to proceed by ejectment, until the expiration of fifteen days, nor at any period of time until there is the want of a sufficient distress upon the premises, nor any right to recover the mesne profits further back, than not only the expiration of the fifteen days, but also the time when there can be proved to be, or when there was such want of distress ; and so long as there continues such a distress, the only remedy the landlord has for the rent, is by action for it, or by distress ; so that instead of having the rent by the payment and act of the lessee himself, or in default thereof, an immediate right to enter or recover possession of the land itself, the remainder-man is driven to the necessity of incurring, not only the trouble and expence of ascertaining whether there is or is not a sufficient legal distress upon the premises, whether of the property of the tenant or of third persons, and of waiting, where the distress is of standing corn, until it is ripe and cut (for till then, it cannot, by the statute, be appraised or sold for the payment of the rent), but also of incurring the trouble, delay, and risk attending the making the distress, in such manner as is in no respect illegal, either by reason of the manner of making or disposing thereof, or by reason of the distrained property being privileged from distress by the same being in the way to market, or by reason of trade or otherwise.

But, further, the tenant may deprive him of the power of sale by a replevy of the distress, and it may happen at the end of the replevin suit, that by the eloignement of the distrained property, the insufficiency of the pledges in replevin,

and the insolvency, or death without sufficient assets unadministered of the sheriff and the tenant, his remedy by distress may finally fail, with the additional loss and costs of both the distress and of the replevin suit; and if this does not happen, he may still be without his rent, unless he take upon himself the trouble and expence of prosecuting execution *pro retorno habendo*, or for his debt and costs, and the trouble and risk of prosecuting some further action or actions against the sheriff or the bail in replevin, in case such execution shall prove ineffectual; and his remedy by ejectment would be delayed in that case, until these results of the replevin suit shall have been ascertained, even if an action of ejectment would then lie for the non-payment of that rent, which had been before distrained for. So that after the termination of the distress and replevin suit, it may happen that the remainder-man may lose his rent, and with the addition of costs. The payment of the rent, is not therefore, I think, as effectually and beneficially secured by the right of re-entry actually reserved, as if that right had been reserved in the words of, or according to the leasing power.

I have considered the question as above, independently of the disputed authorities of *Coxe v. Day* (a), and *Doe, d. Vaughan v. Meyler* (b), both of which I think were rightly decided, notwithstanding the prior case of *Hotley v. Scot*. I have considered the question, too, as if in the lease, the rent reserved had been a money rent only; because it has been so treated in the arguments here, and in the Courts below; but it is to be observed, that this is not the case of a lease for a money rent only, but also, for a rent of another nature, although, certainly, a very small one, viz. the additional rent of a couple of fat capons, or money, at the election, not of the tenant, but of the lessor or remainder-man, who would therefore be entitled if he pleased, to have that rent in kind, instead of money.

(a) 13 East, 118.——(b) 2 Maul. & Selw. 276.

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It has been considered on all sides, as the case of a lease for a money rent only; I presume, on this ground, that the special right of re-entry, depending on the want of a sufficient distress, does not apply to this additional rent or reservation, but to the money rent only; and that the right of re-entry applicable to this additional rent, is the general right of re-entry subsequently given by the lease, in case of default in payment or performance of any of the reservations, covenants, &c. and this may be the case if the statute 2 *Will. & Mary* (a), (which is the statute giving the power of sale of a distress for rent arrear), be deemed to be confined to money rents only; but if the default of payment of this additional rent be within the special right of re-entry depending on the want of a sufficient distress, more especially, if this kind of rent be also not within the above statute—so that this distress could not be sold under that statute for the purpose of raising or paying that rent, though if it could be so sold for that purpose, it would not raise the rent in kind agreeably to the landlord's right of election, but in money only, at least, not without additional trouble or expence to the landlord of purchasing the rent in kind with the money raised by the sale, that is, either by doing it himself, or procuring another to do it for him;—I say, that in such case, the question proposed to us by your Lordships, as it appears to me, would embrace still further considerations arising from those circumstances, as the distress for that small rent in kind, viz. the two capons, would, in that case, (that is to say, if it could not be sold under the statute) remain only a dry, unprofitable, chargeable pledge for such rent, in lieu of the productive security and enjoyment of the land. This, however, it is unnecessary for me to consider, inasmuch as, whether the additional rent in kind would embrace further considerations as to the law of the case or not, I think, for the reasons which I have before stated, that, having due regard to every thing alluded

(a) Sess. 1. cap. 5. s. 2.

to in the question proposed to us by your Lordships, the lease in question is invalid.

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Mr. Justice PARK.—I shall answer the question proposed by your Lordships very shortly; because I have so fully given my opinion upon it in another place, a full and accurate report of which, in two different books (*a*), is in the hands of some of your Lordships; and meaning in what I am to trouble the House with, to adhere to the opinion I formerly delivered, I of course, in answer to your Lordships' question, must state, that the demise of the 5th September, 1803, is, in my opinion, invalid. I shall proceed to assign to your Lordships, as the question requires, my reasons for so thinking: but before I do so, I beg your Lordships to believe me, when I positively disclaim the notion, that I thus give my opinion, in order to preserve my own consistency. I have often heard eminent Judges so declare; but surely, consistency in error is no credit to the man or the Judge. For one, I should never be ashamed, (and have lately so acted upon that feeling, where my understanding is convinced that I had on some former occasion founded an erroneous judgment), manfully and fearlessly to acknowledge it; and as speedily as possible to retrace my steps. The objections to this lease are two: viz. that it does not pursue the power, inasmuch as a clause is required to be in every lease in these words, "So as there be contained in every such lease a power of re-entry for non-payment of the rent thereby to be reserved," and nothing more; whereas, it is said, this lease contains a power of re-entry not *generally*, but clogged with two conditions,—“Provided the rent, &c. shall be behind and unpaid, &c. for fifteen days, and no sufficient distress can or may be had or taken upon the premises.” These two objections fall under very different considerations; but it must be admitted, that if either of them prevail, the lease

(a) See ante, vol. iii. page 440. 1 Brod. & Bing. 171.

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is invalid. As to the general rules which govern the Courts in the construction of leasing powers, they are all now well understood, and have been so fully explained and commented upon by some of my learned Brothers who have preceded me, that it would be a silly parade of learning, and a useless waste of the time of the House, to enter upon them: it being sufficient to state that the intention of the parties, as it is to be collected from the whole of the instrument, is to be the governing principle in the construction. The words of the power having been read to your Lordships, "So as there be contained a power of re-entry for non-payment of the rent thereby to be reserved," a question was put at the bar, "if a plain man were asked how he would execute such a power, what his answer would be?" I state distinctly, that he would say, "insert a clause in the very words of the power, that the lessor shall have a power to re-enter for non-payment of the rent thereby to be reserved." In my conception, he would be very much surprised to find two conditions, which he would in vain look for in the power, but which materially alter the rights of the remainder-man. The power to make leases is to be construed so as to lean neither to the one party nor the other, for the creatrix of the power certainly intended that they should operate for the benefit of both:—of the one, by his enjoying during his life, an estate well cultivated—of the other, (*viz.* the remainder-man), by his not coming to an impoverished one. It seems to me, that to contend for what is relied on by the plaintiff in error, is to say, that *absolute* and *conditional* mean the same thing:—or that a power clogged with two conditions, is the same thing as an unclogged and unconditional power.

When this case was before the Court of Exchequer Chamber, I stated, that if the only objection to the lease in question, was the time given, before the lapse of which the party could not re-enter for non-payment of the rent, as then advised, it would be a fatal objection (*a*). I have heard nothing since,

(a) See ante, vol. iii. page 443.

to remove any doubt. It is said, indeed, that the indefinite article *a* being used, viz. *a* power, *any* power that is reasonable may be inserted. But what right have we to do this for the grantor of the power? Who has a right to insert this word? Who, if inserted, is to construe it? The Court or the Jury? If fifteen days be reasonable, why not twenty, twenty-five, or thirty? That this was never contemplated by the creatrix of the power, I think quite clear; for whenever time is meant to be given, it is expressed, and therefore she must be presumed to have known, that where she meant to give time, it ought to be expressed; lest the giving it in one case should be construed, as I construe it, viz. that it was not intended to be given in the other. But I have said, and I repeat, what right have we to insert the word *reasonable* into this power? If this word never found its way into powers, it might, perhaps, more fairly be argued that it was inherent in all. But looking at precedents and adjudged cases, we find the words *usual* and *reasonable* sometimes jointly introduced, sometimes separately; and these words, when introduced, compel the Courts to consider what are *usual* and what are *reasonable* covenants under such powers. If, then, it is not unusual to insert such words, why are the Courts to introduce them where the maker of the power has not, and who, by omitting them, must be taken to have intended that they should not be inserted? But I am staggered by what is said in a book of great authority (a), and to which I think the profession and public are much indebted, that "if this objection were to prevail, it would invalidate nine-tenths of all the leases in the kingdom granted under powers." I can only say, that such a consequence is to be deeply deplored; but it is entirely owing to this, that those who have prepared such leases, have chosen to follow their own new-fangled conceits, instead of using the exact words of the power,

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(a) Sugden on Powers, 3d edit. page 625.

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conferring the right to lease upon certain terms, and upon certain terms only. This argument, that many leases will be invalidated, may be a very good one with respect to your Lordships in your legislative capacity, on account of the hardship of the case, but cannot, and ought not, to influence you when your province is *jus dicere, non dare*. However, if this were the only objection to the lease in question, on account of the long practice which has prevailed, as it is alleged, I might be inclined to pause before I presumed to offer my humble opinion to your Lordships, that on this ground alone the lease would be void.

But the second objection seems to me to be impossible to be got over. I have thought much about it, both before I gave my opinion in the Exchequer Chamber, and since; I have turned it in every point of view; I have heard all that the learning and ability of the bar could suggest; I have, of course, been present at all the conferences with my learned Brothers; I have been most desirous to be convinced, whether my opinion was erroneous; but, after all, I cannot raise in my mind a probable doubt; and, though, if the decision of your Lordships should be ultimately in favor of the lease, it will be my duty to conform to that opinion; I am at present bound to state my entire concurrence upon this point with my learned Brothers (Mr. Justice *Richardson*, Mr. Justice *Burrough*, and Mr. Justice *Holroyd*) who have preceded me. Their luminous exposition of the argument, and my own judgment in the Exchequer Chamber, which is very accurately reported both by Mr. *Moore*, and by Messrs. *Broderip* and *Bingham*, render it unnecessary for me to do more on this head, than to make an observation or two on the cases which have been cited.

The main reliance on the other side is on the case of *Hotley v. Scot* (a). Of the reporter of that case, I shall say no more than this, (without forming any judgment of my own), that during a professional life of forty years, *Lofft's*

(a) *Lofft*, 316.

Reports, embracing a period of that great man's life, who then presided in the Court of *King's Bench*, during which, as to this part of them, there is no other reporter (for the Reports of the very learned person now at your Lordships' table (a), did not commence till 1774, which was nearly two years after the decision of *Hotley v. Scot*), and I never heard *Lofft's* Reports quoted three times in any Court. But, without any observations of this kind, it is quite clear from that report, that none of the learned Counsel then at the Bar, neither Mr. *Dunning* nor Mr. *Bearcroft*, nor my Lord *Mansfield*, nor any of the Judges, appear to have taken the least notice of the condition as to the want of a sufficient distress, which is the very point now under consideration, and which, from the terms of the power and lease in that case, might have arisen. But it is said, that Mr. *Butler* has a note of that case (b), which was taken by himself, and in which it appears to have been mentioned. I have not seen that note, and therefore can say nothing about it. I entertain great respect for that gentleman, and I do not wish to depreciate the labours of the young, but, unless he be much more advanced in life, than for the sake of the public I wish him to be, he must have been, forty-eight years ago, a very young man. But, admitting the point to have been mentioned, it cannot have formed a prominent feature, either in the argument at the bar, or in the consideration of the Court; for if it had, it is impossible that Mr. *Lofft*, or any other man, in a report of four pages, should have omitted it. Can such a case, for a moment, be put in competition with that of *Core v. Day* (c), where this clause was the main objection to the lease—a case most ably argued at the bar by the now Chief Justice of the Court of *King's Bench*, and receiving the deliberate certificate of four very eminent Judges?

In the course of the argument in that case, Lord *Ellenborough* said, "There can be no doubt, that it is more bene-

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(a) Mr. *Cowper*.—(b) Ante, page 346.—(c) 13 East, 118.

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ficial to the owner of the estate to have a power of re-entry at once upon the tenant, upon non-payment of the rent, within a certain time, than to have such a power only in case there shall be no sufficient distress upon the premises." And in another part of that argument, when Mr. *Abbott* was strongly pressing on the Court that such a clause secured the landlord's object, viz. by satisfying his rent more speedily than in any other way, his Lordship observed, in answer, "In the one case, it is to be secured from time to time, by successive suits, with the risk of sureties, if the distress be replevied: in the other, it is secured, once for all, by the landlord's re-possessing himself of the land out of which the rent is derived." Can any one say, that the one remedy is not more easy, more direct, and less circuitous, than the other? And Lord *Ellenborough* again said, "Surely the direct power is more beneficial to the landlord." Besides, the certificate of all the learned Judges is in direct conformity with these *dicta* of his Lordship; for it is in the following terms, viz. "We are of opinion, that the power of re-entry reserved in and by the said lease for non-payment of the rent, is not made in conformity to the power in the settlement for granting leases of the freehold part of the said demised premises, and that the lease is void on that ground."

Not having seen any report of the judgment of the Court of *King's Bench* upon the present case (*a*), I cannot tell whether that of *Coxe v. Day* was recalled to their attention; but I am quite sure it is impossible to reconcile the one with the other. This was so strongly felt by two very learned Judges in the Court below, that, at once they doubted the propriety of that decision: and one of them said, "it was not law; for it was diametrically opposite to reason and common sense." I am sorry to say I think directly the contrary; but I for one, seriously object to this mode of getting rid of decisions, because they militate against our own notions. I agree with the pointed manner in which this was lately expressed in

(*a*) See 5 Maul. & Selw. 475.

this House by the present Lord Chief Justice of the *Common Pleas*: and I hope I shall be excused for using his language, viz. "If the law so settled, is now to be considered as unsettled, I know not on what foundation, in point of law, any decision can stand (a)." But the case of *Coxe v. Day* is not a solitary one; for the question, in about three years afterwards, again came under the consideration of three of the same Judges who decided that case, viz. Lord *Ellenborough*, Mr. Justice *Le Blanc*, and Mr. Justice *Bayley*, with the addition of another learned person, now no more, (Mr. Justice *Dampier*); and they could not have decided as they did, without determining that such a clause as we are now considering, rendered a lease void, where the power did not authorize it. The case I allude to, is *Doe, d. Vaughan v. Meyler* (b), which was tried before the latter Judge at *Hereford*, who thought the objection, such as we have here, was one that went to the whole lease; though it was partly of lands of which the lessor was seised in fee, and of lands in which he had only an estate for life, with a leasing power, provided there was a clause of re-entry for non-payment of the rent for fifteen days. There, the lease was not executed according to that power; for it added, "and if there be no sufficient distress:"—But the Court held, that though the lease was void, because it was not executed according to the power, yet, it was good as to the land of which the lessor was seised in fee, and they apportioned the rent: which was an erroneous judgment, if the objection to the present lease be not a good one. The case of *Rees, d. Powell v. King* (c), I formerly thought, and still am of the same opinion, sets this point at rest, by shewing that such a clause as this, throws a burthen upon the right of re-entry, which the maker of the power never contemplated. That case having been so often mentioned, it is enough for me to say of it, that it has decided that before a plaintiff in ejectment can recover upon a clause of re-entry in a lease, in case there be no sufficient distress

(a) See *Rowe v. Young*, 2 Brod. & Bing. 275.—(b) 2 Maul. & Selw. 276.—(c) Forr. 19.

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upon the premises, he must shew that every part of the premises has been searched, or else he cannot say there was no sufficient distress.

The Judge who first decided this, was well known to some of your Lordships; and no man will decry the knowledge of the late Mr. Justice *Heath*, and his opinion was confirmed by the Court of Exchequer.

If the Courts of *Westminster Hall* were to overturn that decision, it would go a great way to shake my present opinion; but I do not learn that any of my Brethren are prepared to do so; and if, therefore, I feel myself bound, (as I shall do), to call upon any plaintiff in ejectment on the circuit, who has such a clog on his clause of re-entry as this, to prove that he has made a full search for a distress, before I permit such a plaintiff to recover, I cannot conscientiously advise your Lordships that this lease is valid; most sincerely wishing however, that, consistently with my honest opinion, I could do so.

Of one other point I must take notice, viz. that, as this lease contains a general clause of re-entry, it must necessarily control the special clause. To that position, I, for one, cannot at present agree; for I find the contrary doctrine maintained, from *Altham's* case (a) down to the present day. In that case we find this position, or rather this maxim adopted. In the first part of the argument, putting every point that can possibly occur, Lord *Coke* says, "*Quando carta continet generalem clausulam, posteaque descendit ad verba specialia, quæ clausulæ generali sunt consentanea, interpretanda est carta secundum verba specialia.*" But he goes on to add, there is another rule or principle of law, viz. "*Generalis clausula non porrigitur ad ea quæ antea specialiter sunt comprehensa.*" Therefore, I say, this point, for which I am now arguing, being first specially defined, cannot be enlarged by a subsequent general clause, which can only apply to cases not before specified or defined. So, in *Sheppard's Touchstone* (which is supposed to be the

(a) 8 Rep. 151 (b).

work of Mr. Justice *Doddridge*), on the exposition of deeds in confirmation of the above doctrine, that writer says (a), "If there be two clauses or parts of the deed repugnant to one another, the first part shall be received, and the latter rejected, unless there be some special reason to the contrary." If we descend to more modern times, we find the same rule universally adopted and confirmed by Judges on particular cases depending before them. In *Cothor v. Merrick*, Mr. Baron *Nicholas*, quoting the *Year Book of Hen. 6*, in support of his opinion, says (b), "Where there are two clauses in a deed, of which the latter is contradictory to the former, there the former shall stand." And not to multiply authorities upon a point on which Lord *Ellenborough* entertained a strong opinion, against the validity of an argument founded on such a point, I shall only quote one more, from what Lord Chief Justice *Holt*, and two of his Brethren said, in *Thomas v. Howell* (c), that "in deeds, it was admitted, that subsequent clauses which are general, shall be governed by precedent clauses, which are more particular." I therefore think that this ground does not in any way strengthen the argument as to the validity of the lease in question. The point upon the statute 4 *Geo. 2*. has been so ably handled, and so luminously explained by my Brother *Holroyd*, who has preceded me, that I shall not trouble your Lordships upon it, but merely to say, that I entirely concur with him.

The next point is, whether the other leases should be admitted as evidence? And upon that question I shall trouble the House very shortly. I am willing to admit, that if this deed upon the clause in question, contains any latent ambiguity raised by extrinsic evidence, parol or extrinsic evidence may be admitted to explain it, or to render it unambiguous.

But I have never heard the general rule contradicted, that parol or extrinsic evidence cannot be admitted to contradict, vary, or add to the terms of a deed. It would be of a

(a) Cap. 5. p. 88. fol. 7.— (b) Hardr. 94.— (c) 4 Mod. 69.

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most dangerous consequence to admit such testimony; for then, parties dealing on matters in writing, made upon advice and consideration, would be subject either to the uncertain testimony of vague and precarious memory; or, as in the case at the bar, to matter, of which at the time of contracting, they might have had no knowledge, and of which they never intended to be under the control. The written instrument, therefore, unless in cases of fraud, or other excepted cases, with which I need not trouble your Lordships, (and of which I insist this is not one), must be considered as speaking the sense of the parties to that deed or instrument.

Upon this ground I conceive it was, that the case of *Cooke v. Booth* (a) met with such a decided opinion against it in *Baynham v. Guy's Hospital* (b), by Lord Alvanley, when Master of the Rolls, who not only stated his own opinion, but that of the late Mr. Justice Wilson, who had argued the former case, and who, Lord Alvanley said, was astonished at the decision; and it was also disapproved of by Lord Thurlow. The Master of the Rolls said, "I strongly protest against the argument of the learned Judges in *Cooke v. Booth*, as to construing a legal instrument by the equivocal acts of the parties, and their understanding upon it." The case of *Tritton v. Foote* (c), seems also directly at variance with *Cooke v. Booth*. In *Iggulden v. May* (d), the Court of Exchequer Chamber unanimously affirming a judgment of the King's Bench, held, that a covenant in an indenture of lease to grant a new lease with all covenants, grants, and articles, as in the said indenture is contained, does not bind the lessor to insert a covenant of renewal in the renewed lease; although it was alleged in the pleadings, that the covenant required had been introduced in various other cases, before then successively made and executed, on re-

(a) Cowp. 819.—(b) 3 Ves. 298.—(c) 2 Bro. Chan. Cas. 636.—  
(d) 2 New Rep. 449. S. C. 7 East, 237, where the original case and pleadings are stated,



renewals from time to time granted. Lord Chief Justice *Mansfield*, stopping the then Mr. *Abbott*, who was to have argued against the construction contended for on the other side, said, that "the case of *Cooke v. Booth* was the first time that the acts of the parties to a deed were ever made use of in a Court of law, to assist the construction of that deed;" and in another part of his Lordship's judgment, he said, "that is a case which has been impeached upon all occasions, and in which the Court of *King's Bench* were misled by the renewals stated in the case sent from the Court of Chancery."

Now, what is asked for in the present case, but to assist the construction of an unambiguous deed by the prior acts of the parties? In the case of *Doe, d. Allan v. Calvert (a)*, which I argued as counsel, though the lease there was according to the custom of the country, as to the time of holding; yet, being dated on the 29th *March*, it was held not to be a lease in possession; and that, because the days of holding were, as to the tillage, from the 13th *February* past; the pasture ground from the 5th *April* next; and the residue of the premises from the 12th *May* next.

But, my Lords, in my opinion, cases are not wanted to prove that no evidence can be admitted to explain a deed, which is plain and perspicuous in its terms, and containing no ambiguity; much less to add clogs and conditions to it. I am asked then, is this a deed of that description? I answer, that in my opinion it is. I can see no ambiguity; it is precise and definite in the powers granted; and every person possessed of plain and common understanding, (much more any person with a legal mind) can give it a clear and satisfactory solution. But I am told, the case of *Fonnereau v. Poyntz (b)*, before Lord *Thurlow*, is against my opinion. Upon the best attention I can pay to that case, I do not think so.—It was a bequest of 500*l.* stock, in long annuities, and similar bequests of smaller sums in the same

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(a) 2 East, 376.—(b) 1 Bro. Chan. Cas. 472.

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stock, to others. The question was, whether this was a bequest of 500*l.* a year long annuities, or only 500*l.* in the long annuities. The case was very powerfully argued by one of your Lordships : I own I should have thought there was no difficulty in the construction, and Lord *Thurlow* seemed at first to be of that opinion ; but he afterwards admitted evidence to shew the extent of the property of the testatrix, to see whether she could possibly mean 500*l.* a year, when she had no such stock. But though his Lordship admitted this, he stated the clear principle of law to be, that, for the wisest reasons, it would not admit of an instrument being construed *aliunde*. And, at the close of that case, his Lordship said, (what I quote to your Lordships as strong in my favor, because he only let in the evidence to explain what was uncertain)—“ There is no doubt, if the word *stock* had been left out, but that the meaning would be, that the sum of 500*l.* was to be disposed of in long annuities, and to make a produce ; and that produce to accumulate until the legatee should obtain twenty-one. This being the doubtful interpretation upon the face of the will, the question arises, whether the state of the testatrix's fortune is not applicable to the construction of the will. It appears by some other parts of the will, that she was extremely anxious to make an ample provision for the family of the *Fonnereaus*. Considering then, the situation of her fortune, it is perfectly inconsistent to say that she could mean to give ten times more than she was worth, in legacies. My opinion therefore is, that the judgment must be reversed, and that I can let in the evidence of the value of the estate, not to control the bequests which the testatrix has made in words themselves distinct, nor to control the bequest she has made of a subject which she had accurately described ; but because the words she has used are uncertain. The peculiarity of this will, furnishes sufficient doubt to warrant the admission of collateral evidence to explain it ; and if so, the statement of the testatrix's fortune is applicable to the purpose of such an expla-

nation." His Lordship, whether right or wrong in his notion, clearly admitted evidence *aliunde*, on the ground of uncertainty and ambiguity only, and left the principle wholly untouched—that parol evidence, or evidence *aliunde* cannot be admitted to contradict, add to, or vary the terms of a deed, will, or other written instrument.

Here, the terms of the power are clear and express, without limitation, clog, or condition—nothing being doubtful or ambiguous; and the evidence sought to be admitted, is not to explain that which is doubtful, but to add two clauses or two conditions to that which is absolute and unconditional: in short, to make a new deed in this respect. The decision I am humbly recommending to your Lordships, steers clear of all vagueness and uncertainty, leaving nothing to the variety of conflicting opinions; for who is to decide what is reasonable? If the Judges, I should be inclined to think it would be mischievous in its consequences; but worse, if the jury are to be called on to decide it. What can lead to such contrariety of decision? for we all know, in every transaction of human life, what is reasonable or unreasonable must depend upon the reasoning and feeling of every individual who has to consider the question.

I have heard it said, that if this question be decided in the view I have taken of it, it will unsettle many leases. I should lament if it should have such an effect; but in that case, the legislature might interpose. If, however, the mode of construing powers, which I am proposing as the true one, had been always adhered to, no such evil could have ensued. The hardship of the individual case is represented; and if there be hardship, I also, as an individual, lament it. This statement of hardship, and the consequences of what I should propose, have made me again and again examine this point with all the ability in my power; but, after all this consideration, feeling that it is my sworn and therefore bounden duty to declare what I believe the law now to be—not to say what it ought to be, I think, that to

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decide in favor of the lease, would be to make a power substantially different from that which was made; and to make conditions which the creatrix of it never intended. This would be my opinion if I stood alone, but I am happy not to be singular in my judgment on this important question, although I am opposed to others, whose ability I respect, and whose learning I revere.

Mr. Justice BAYLEY.—Upon the best consideration I have been able to give this case, I can find no reason for departing from the opinion which I formerly entertained, when it came first before the Court of *King's Bench*, viz. that the lease in question is conformable to the leasing power contained in the deed of settlement; and is therefore valid. As to the case of *Holley v. Scot*, I beg to state, that it was in the perfect recollection of the Court when the present came before them; and they considered, that it did not, in any respect, break in upon their determination in *Coxe v. Day*; neither do I think that the opinion I have formed, will trench on that case. The clause in the settlement under which this lease was authorized, requires it to contain “a power of re-entry for non-payment of the rent;” and the first question I propose to consider is, whether this lease does or does not contain a power of re-entry for non-payment of the rent? It contains a proviso, that if the rent shall be behind or unpaid by the space of fifteen days, and no sufficient distress can be had upon the premises, the person entitled to the rent and the freehold and inheritance, may re-enter. Is this, or is it not, a power given to the landlord? Undoubtedly it is. Does it not enable him to re-enter? It does; and for what cause? For non-payment of the rent reserved. I admit, that it is not an immediate or unconditional power of re-entry; but still it is “a” power of re-entry, and for non-payment of the rent reserved.

It is material to this question, to consider what the law was with regard to powers of this nature, from the earliest

times. In *Coke Littleton* (a), we find instances of various conditions for re-entry, "if the rent be behind by a week after the day of payment," or "by a month," or "half a year." We find also from the *Year Books* (b), that the time for making demand of the rent to warrant a re-entry, is at the end of the last day of such week, month, or half year, and not on the preceding rent day. It is not, therefore, inconsistent in law with a requisition that there should be reserved a power of re-entry, that it be not immediate, but postponed for some given length of time after the day fixed for the payment of the rent. In *Hoodie and Winscomb's* case (c), we have an instance of a condition for re-entry, "if the rent be behind, and there be no sufficient distress upon the land;" I therefore infer from these instances, that a power of re-entry on condition that the rent be behind fifteen days, and there is no sufficient distress upon the premises, is an acknowledged legal power of re-entry for non-payment of rent. The power, as reserved in this case, may, however, not be the most beneficial to the reversioner, which could be devised: and being qualified with these conditions, it may, in certain possible cases, not afford the conveniences upon absolute right of re-entry; but still it is a power of re-entry, and, if it be sufficient to secure the payment of the rent, I hold that this lease contains, in terms, all that is required by the words of the leasing power in the settlement.

But then it is argued by those who would impugn this lease, as not being a good execution of the power to demise, that admitting it to contain a power of re-entry, yet, it is not such a power as the indenture of the 2nd *July*, 1757, due regard being had to its intent and meaning in legal construction, requires to be inserted in the leases to be made under such particular power. That argument, however, necessarily assumes, that the words of the power are not so clear and

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(a) Sec. 325.——(b) 20 Hen. 6. 30, 31. 6 Hen. 7. 3. Bro. Abr. tit. *Entre Congeable*, pl. 90.——(c) Godbolt, 110, ca. 130.

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precise, but that they are capable of more than one meaning; otherwise, indeed, the proposition would be self-evident.

Many different sorts of powers are known to the law: some more beneficial than others. Some are qualified, some are not. Some are conditioned to hold the land till the rent is satisfied out of the profits (*a*); some to hold till the rent is satisfied *aliundè*; and some (as here) to restore the reversioner to his former estate (*b*). There are others, containing the conditions which form the subject-matter of the objections to this lease, and which I have already noticed, *viz.* postponement of time, and absence of distress upon the land. Some, again, (though very few) have neither of those conditions; and the question now for your Lordships' consideration, I apprehend, is, which of these powers, having due regard to the intent and meaning of the indenture of the 2nd July, 1757, does that instrument, according to legal construction, require? The intent and meaning of that indenture is to be collected either from it intrinsically, without looking out of or beyond it, or from the contents of the instrument, combined with the consideration of the state of the property at the time when it was made. And then arises the other question—whether the evidence of the then existing leases, and of the powers of re-entry therein contained, (and which I shall presently consider) be admissible or not, not merely for the purpose of explaining, adding to, or varying a written instrument, but to shew the meaning of the language which the settlor has used in this requisition, which she has left quite indefinite and necessarily to be supplied by reference to matters extrinsic.

Taking it first, however, with reference to any such extrinsic matter, it seems to me that the intent and meaning of the indenture *per se*, and without looking beyond it or out of it, was, that the reversioner should have such of those powers as would give him a proper and reasonable security for his rent by way of re-entry. If nothing short of a right of im-

(*a*) Co. Lit. sec. 328—203, (*a*)——(*b*) Id. 324.

mediate re-entry—whether there were a sufficient distress upon the premises or not—would give him that security; I might be of opinion, that in such a case, he would be entitled to have such a power inserted in the lease as would alone ensure to him that right.

But if any of the other species of power would give him a proper and reasonable security, it seems to me that the insertion of either of those other qualifications would satisfy all that the indenture of 1757, in point of legal construction, requires. The rent is not a rack-rent: it is merely an old ~~not~~ customed rent of 2*l.* 1*s.* 6*d.* *per annum*, payable half-yearly; and for a lease for three lives the lessee surrendered a subsisting lease, upon which, at least, one life must have been in *esse*, and paid 105*l.* A half-year's rent, therefore, would be 1*l.* 0*s.* 9*d.* only; and such a rent was certainly not likely to occasion the reversioner much thought or care as to any probability of its loss; for he could not consider it possible that the premises would ever be so completely deserted, ~~as~~ that there should be no sufficient distress upon them at any time: nor was the rent of such consequence as to make it probable that the tenant could, upon any occasion, be induced to replevy a distress. For such a rent, therefore, ~~the~~ power in question to re-enter at the end of fifteen days, if there were no sufficient distress upon the premises, appears to me to be an adequate and reasonable security; and I should be disposed to think, that for such a rent, a clause of re-entry without giving any days of grace, would be unreasonable; because the immediate exercise of such a right would be oppressive.

Nor do I think it unreasonable to restrain the reversioner from enforcing the power of re-entry, whilst there should be a sufficient distress upon the premises; because the legislature did not think it unreasonable to deny the landlord the benefit of the 4 *Geo.* 2. *c.* 28. where there was a sufficient distress: and the landlord can have no difficulty in ascertaining whether there be such a distress or not; for he has a right

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to enter daily with his bailiff upon the premises, to see whether there be such a distress, and according to the case in *Godbolt (a)*, if there be nothing that he can see upon the premises to distrain, he is warranted in concluding that there are no distrainable goods there. The words of the report are, "It was holden by all the Justices, that if a man make a lease, rendering rent, upon condition that if the rent be behind, and no sufficient distress upon the land, that then the lessor may re-enter; if the rent be behind, and there be a piece of lead or other thing hidden in the land, and no other thing there to be distrained, the lessor may re-enter; for the distress ought to be open, and to be come by; for if it should be otherwise said a sufficient distress, one might inclose money or other things within a wall, and thereby the lessor should be excluded of his re-entry." I am therefore of opinion, that without looking beyond the indenture of *July, 1757*, the power in question is conformable with the requisition, and within the true intent and meaning of that indenture: and that it is, in the legal construction thereof, as large and beneficial a power of re-entry as that indenture required.

I am also of opinion, that in judging of the true intent and meaning of the indenture in this respect, we are at liberty to take into consideration the state of the property at the time that indenture was made, to see to what restrictions the lessees were then subject, and what rights the lessor then retained. The settlor used the indefinite words "a power of re-entry." By shewing, as I have done, that there are many such powers recognized by law, I prove that there is an ambiguity in these words, either latent or patent, which makes it necessary to refer to the actual state of the property at the time when the settlement was made, in order to ascertain the intent of the settlor, and in what sense she used such words. I have never before heard it doubted, whether the nature and general mode of tenure of an estate, and the interest of the owner, were admissible in proof to ascertain

(a) Ca. 130. Page 110.



the nature and design of an indefinite power to lease granted by the settlor of the property. I am not, by so saying, construing a legal instrument by the acts of the parties, or by their understanding of it, (as was done in *Cooke v. Booth* (a)); but by shewing the circumstances and situation of the parties, and the estate and interest which the settlor had at the time of the settlement, I am enabling the House to judge, what in legal construction, was her meaning in using indefinite terms; and I am not aware that there is any legal authority for excluding the evidence of such circumstances and situation for such a purpose. On the contrary, there are several authorities for admitting extrinsic evidence, where the doubtful wording of an instrument seems to render it necessary to seek an explanation *aliunde*. In *Doe, d. Allan v. Calvert* (b), which was argued on a question, whether the lease was a lease in possession or reversion, the custom of letting was given in evidence to shew that the periods mentioned in the *habendum* of the lease for the tenant's entry on the part of the premises then in question, were the usual periods of entry customary in that part of the country. That evidence was argued upon and admitted without objection; and that fact was held by the Court, who did not advert to its being inadmissible, not to have the effect of controlling, on the principle of intention, the words of the power (which was to lease in possession, and not in reversion) so as to get rid of the objection, that a lease dated the 29th *March*, under which entry was to be made by the tenant as to all the ground, except the tillage, on the 5th *April* and 12th *May* then next ensuing, was a lease in reversion, and therefore not warranted by the power.

How that case bears on the question, so as to support the proposition, that the extrinsic evidence received in the present was inadmissible, I am quite at a loss to discover.

In the case of a person's making a deed or will, have we not a right, when it is necessary to the understanding of it, as

(a) Cowp. 819.—(b) 2 East, 376.

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it frequently is, to enquire what estate he had at the time of executing such instruments? That is often a fact necessary to be known, because the true construction often turns upon it, and may be varied according to the result of the enquiry. I will put this familiar case: if one grant to another a lease for life, without expressing it to be for the life of the lessor or lessee—is not evidence not only admissible, but necessary, to shew what interest the lessor had in the property at the time? For if he were tenant in fee, the lessee would take a lease for his own life, whereas, if the lessor were tenant in tail, or for life only, the lessee would take only for the life of the lessor (a). So, where a testator gives a sum of money by the description of so much stock, if he have such stock, it is a specific bequest of it; but if he have it not at the time of his death, evidence may be received to shew that it had been transferred to some other fund, and the bequest would thereupon be established. That principle was acted upon in the case of *Selwood v. Mildmay* (b), where extrinsic evidence was admitted to shew that the testator had no such stock as he had bequeathed, having transferred it to another fund before his death. In *Masters v. Masters* (c), extrinsic evidence must have been admitted, to have rescued the bequest there from the effect of that uncertainty which would otherwise have rendered it void. But I wish to call your Lordships' more particular attention to the case of *Fonnereau v. Poyntz* (d), where the testatrix gave to *Mary Poyntz* the sum of 500*l.* stock in long annuities, the same sum in the same stock to another person, and 200*l.* and 100*l.* stock in long annuities to two other persons, the interest of the two latter sums to accumulate till the legatees should attain twenty-one, and then the whole to be transferred to them by her executors: and she bequeathed the residue of her estate, both real and personal, to her two nephews. The testatrix having only 120*l.* *per annum* stock, at her death in long annuities, parol evidence was ad-

(a) See S. P. Shep. Touch. 88.——(b) 3 Ves. 306.——(c) 1 Peere Wms. 421.——(d) 1 Bro. Chan. Cas. 472.

mitted (after it had been first held by Lord *Thurlow* not to be admissible) to shew the actual amount of her fortune, and the state of her property (which was admitted to be extrinsic evidence) in order to enable the Court to construe the will by the criterion of her intention, if it might be collected from the state of her circumstances at the time it was made. His Lordship ultimately decided that the peculiarity of the will furnished sufficient doubt to warrant the admission of collateral evidence, to explain whether she meant to bequeath to the legatees a gross sum to accumulate, or that sum *per annum* by way of annuity; and on admitting the evidence, the same sum to be paid as an annuity was found to be ten times as much as she was worth. Extrinsic evidence in that case, therefore, was received and acted upon to explain the meaning and intention of the testatrix as to those bequests, which were otherwise uncertain, and could not, in fact, have been established or satisfied.

The Master of the Rolls (Lord *Alvanley*) afterwards (adverting to that case), in deciding that of *Selwood v. Mildmay*, said (a), "Lord *Thurlow's* only doubt was, whether parol evidence was admissible to ascertain whether the testatrix did not mean capital: but he had no doubt that she must know all the circumstances of her affairs; and therefore his opinion was, that though it did appear she could not mean to give so much more than she could afford, yet he doubted whether he could give the words a meaning so different from their natural meaning." Applying these principles to this case, the evidence objected to here, must necessarily be held to be admissible, on the same or stronger grounds; because it is not offered to set up a construction against the natural meaning and import of the words, nor to controul or modify a power distinctly and accurately described; but to remove an ambiguity upon the face of the instrument which creates it, and which, by using general and indefinite terms, renders it capable of being satisfied in several ways.

(a) 3 Ves. 310.

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Therefore it is, that I think we may in this case, look to the state of the property at the time the settlement was made, in order to be enabled to ascertain the nature of the estate and the interest the settlor had in the property, and the circumstances under which it was usually demised at the time, and what her intention was with respect to the sort of power which she was desirous of having introduced into the leases. From that extrinsic evidence we find the case to stand thus :—Lady *Louisa Barbara Mansel*, being tenant for life, with a power of appointment in fee, of a very considerable estate, part of which was then let out upon leases for lives at small rents, payable partly in money and partly in a render of capons, or money, at the election of the creatrix : and those leases contained powers of re-entry “ in case the rent reserved should be behind for fifteen days, and there should be no sufficient distress upon the premises.” She then settled that estate, amongst other uses, to her husband for his life, with a power enabling him to make leases of a part of the property, which had long before been so let for lives, “ so as there should be reserved the *ancient and accustomed rents*; and so as there should be contained in the leases a *power of re-entry* for non-payment of the rent : and also with a power to make leases at a rack-rent of other parts of the estate ; so as those leases should contain powers of re-entry in case the rent should be in arrear for twenty-eight days.” The true question, therefore, which arises upon these powers, is, whether, by requiring upon the life-leases generally, “ a power of re-entry,” she meant to require more than the same description of power with which the then existing life leases were burthened ; and she must be taken to have known what that power was. Had she been dissatisfied with it, or desirous of making any alteration in that respect, is it to be supposed that she would not have used more definite terms in the requisition than those which she has contented herself with, *viz.* requiring generally “ a power of re-entry ” ?—More especially when we see, that in providing for securing the

rack-rents, where the right of re-entry is obviously of so much more importance, she gives the tenant an indulgence of twenty-eight days; and can it be supposed that she intended to be less indulgent in respect of the small rents, which bore comparatively no proportion to the value of the property? I cannot consider that she could have had any such intention. Therefore, the settlor not having prescribed or suggested any particular species of power, as being required by her to be contained in the leases; and as the power which this lease contains is reasonable, and amply sufficient to answer every legal purpose; and being besides, the very species of power which was at that time inserted in all the leases in force upon this estate at the time the settlement was made—I submit to your Lordships, that this lease was warranted by the terms of the leasing power; and that for these reasons, the original judgment of the Court of *King's Bench* ought to be affirmed.

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Mr. Baron WOOD.—In answer to the question proposed by your Lordships; I am of opinion that the power contained in the marriage-settlement is well executed.

That power applies to lands “leased for lives, or for years determinable on lives, to any person or persons in possession or reversion;”—and one of the conditions of such letting is in these words, “and so as there be contained in every such lease a power of re-entry for non-payment of the rent thereby to be reserved.” There is another power of re-entry which applies to leases for years absolute, not exceeding twenty-one years, to take effect in possession, and to be made at as beneficial yearly rents as was then paid, or the most improved rent, without fine or foregift; and there it is provided, that there be contained a clause of re-entry, in case the rent or rents thereupon to be reserved be behind or unpaid by the space of twenty-eight days after the time appointed for payment. The lease in question is under

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the first power, which provides a re-entry on non-payment of the rent generally, without prescribing any time of re-entry at all, or any special terms whatsoever. The proviso in the lease in question is, that "if the yearly rent of 2*l.*, or any of the duties, services, reservations, and payments thereby reserved, shall be behind, unpaid, or undone in part or in all, by the space of fifteen days after any of the times of payment or performance, and no sufficient distress or distresses can be had or taken, whereby the same, and all arrearages, may be raised." It is contended on the part of the defendant in error, that this proviso of re-entry in the lease, is not such a one as is required by the settlement, inasmuch as it has limited a time for re-entry, which the power has not, and inasmuch as it is clogged with a condition, that there be no sufficient distress, which the settlement does not mention.

The clause in the settlement requires no more than a power of re-entry for non-payment of rent, giving it no qualification or modification at all. There is in the present lease a clause of re-entry, and that is a literal compliance with that power. But though the power is general, I admit, that it must be executed, not in a fraudulent or illusory, but in a reasonable manner, such as the law will deem reasonable. In the clause of re-entry for the rack-rent, the time is limited, viz. twenty-eight days. I allow, that cannot be departed from. Why was no time limited in this? Because the settlement meant to leave it to the discretion of the tenant for life to insert such a reasonable power of re-entry as might secure the rent to the reversioner.

The object of re-entry is merely to secure the rent, and has always been so considered both in law and in equity; and when I see that object is secured reasonably and fairly, and we are not tied down to any specific terms, I think the power is well executed, being according to the intention of the parties. I conceive we ought to consider the deeds and

acta ut res magis valeat quam pereat. In *Cotter v. Mer-
rick* (a), the question was, whether a lease was a good lease;
within the statute 32 Hen. 8. c. 28. That statute is to en-
able tenants in tail to make leases to bind as if they were
tenants in fee-simple. "The second section is, provided such
leases be not for more than twenty-one years, and provided
that upon every such lease there be reserved payable to the
lessors, their heirs and successors, to whom the same lands
shall have come after the deaths of the lessors, if no such
lease had been made, and to whom the reversion thereof
shall appertain, according to their estates and interests, so
much yearly ferm or rent, or more, as had been accustomedly
paid." The lease in that case was made, reserving the rent to
the heirs and assigns of the lessor, who were not the heirs in
tail entitled to the rent—yet, it was held to be a good lease;
and *Ms. Baron Hill* said, "In the exposition of statutes,
the Judges must make such a construction as to advance and
not frustrate the intent of the makers." And *Mr. Baron
Parker* observed, "It is the office of a Judge to preserve
and not to destroy an estate." In that case, the Judges gave
that rational construction to the lease which gave it effect.
So, here, I conceive we ought to do the same, taking the
true interpretation of the power to be to leave the mode of
re-entry to the discretion of the lessor. Has that been fairly
and *bona fide*, and reasonably executed? Is the period of
fifteen days a reasonable time to allow for re-entry? In the
case of rack-rent, twenty-eight days is expressly given. If
the parties have thought that a reasonable time, surely the
fifteen days must be. It is the usual time, as found by the
Jury.—The law will judge what is a reasonable time.

The last objection, and which was mostly if not entirely
relied on, was the clogging the right of re-entry with a con-
dition of there being no sufficient distress on the premises.
Is that reasonable with reference to the law as it stood
when the lease was made? I conceive it is.

(a) Hardr. 89.

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The 2nd *July*, 1757, was the date of the deed of settlement which gives the power of leasing, and which was subsequent to the statute 4 *Geo. 2. c. 28*, which was passed in the year 1731, and which regulates the powers of re-entry for the non-payment of rent.

Before the making of this statute, the carrying into execution a power of re-entry was attended with great difficulty and nicety—there must have been a demand of the rent upon the land. If there were a house, it must have been demanded at the fore-door, and at a convenient time before the sun-setting of the last day of payment, so as that money might be numbered and received. The landlord then had to make an actual entry, and bring an ejectment. If all these circumstances were not critically and exactly performed, he lost the right of re-entry for that time, and must have waited until other rent accrued, and then he had to make a fresh demand and re-entry for the subsequent rent. If he had complied with these formalities, and brought his ejectment, it was the uniform practice of a Court of Equity to relieve against a forfeiture, upon the payment of the rent and costs, considering the clause of re-entry as a mere security for the payment of rent. What is the alteration made by the statute? It has dispensed with the formalities attending re-entries at the common law, and enacted that the landlord, when he has a right to re-enter, and half a year's rent is in arrear, shall and may at once bring his ejectment, and recover possession, provided there is no sufficient distress to be found on the premises to countervail the arrears then due. The tenant also may pay or tender the rent and costs to the landlord, or his attorney, or pay the same into Court before trial, and all proceedings shall cease. The policy of this law is to prevent forfeiture for non-payment of rent, and to facilitate the landlord's remedy for the recovery of it; and at the same time the legislature has thought it right to impose this condition—You shall not eject the tenant, if there be a sufficient distress to secure the rent—you may have an action

or a distress as soon as the rent is due, without waiting fifteen days. It is still said, that "the statute leaves it open to a landlord, if he will comply with the formalities of demand at the last hour of the day, and make re-entry, and in that case the necessity of distress is not imposed on him." What then? The tenant will be relieved against the forfeiture in a Court of Equity. Yet, it does not seem clear, even in that case, that the statute does not shut the door against proceedings by re-entry at common law. But upon that I do not found my opinion. The words of the statute are, "the landlord *shall* and *may* bring ejectment,"—and *shall* is imperative. Under the statute 8 & 9 *Will. 3. c. 11*, "An act for the better preventing frivolous and vexatious suits in actions for penalties for non-performance of covenants,"—the plaintiff *may* assign as many breaches as he shall think fit. It was at first contended, that the statute was not compulsory on the plaintiff to assign breaches—for that the statute was made for his benefit, and therefore he might waive it, and leave the defendant to his remedy in equity; but all the Courts in *Westminster Hall* held it to be compulsory on the plaintiff to assign breaches and assess damages—and the defendant shall not be put to seek relief in equity. This is the fair construction to be put on the statute 4 *Geo. 2*, where the words are stronger—being "*shall* and *may*;" and upon the same principle, if this be the true construction of the statute, and there is no decision to the contrary, then there is an end of the question, for the lease will then have expressed no more than that condition which the statute requires. It might not be necessary to express the condition, because the law imposes it:—but I will suppose it to be left open to the landlord to proceed in the old way, as before the statute, and a reasonable clause of re-entry is all that the power required. Can the insertion of the same condition which the legislature has adopted in similar cases, be considered as unreasonable?

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The case of *Coxe v. Day* (a), has been cited as an authority of the Court of *King's Bench*, that the inserting a condition of re-entry in a lease made under a power in these words—"in case no sufficient distress can be taken on the premises;" they not being inserted in the power—was not a good execution of that power. I doubt very much the propriety of that decision; but be that case as it may, it is different in one material feature from the present. The re-entry required was for the non-payment of the rent reserved by the space of twenty-one days—so that there was a specification of a particular mode—and therefore it perhaps might be inferred no other qualification would be warranted. But here, no time is limited—a power of re-entry generally is all that is required, and therefore I think reasonable qualifications may be made. In the present case, which was only a few years afterwards, the same Court thought that this power was well executed. They must, therefore, have thought that their former decision was wrong, or that this case was distinguishable from it. Lord *Ellenborough* and Mr. Justice *Bayley* sat upon the Bench when both these cases were determined; but whatever may be the construction upon the statute 4 *Geo. 2*, I do not rest my opinion upon that alone. It is founded upon this, that the power of leasing leaves it to the discretion of the lessor to make a reasonable lease, and that the power of re-entry which is contained in this lease is a reasonable one, and therefore that it is not invalid.

The House then adjourned to *Friday* the 18th.

Mr. Baron GRAHAM.—With regard to the question proposed by your Lordships, I submit, that in my opinion the lease of the 5th *September*, 1803, is valid, but out of respect to those from whom I have the misfortune to differ,

(a) 13 East, 118.

I feel it incumbent on me to offer the reasons upon which such opinion is founded. It is necessary, in the first place, to consider the terms of the power contained in the settlement of the 2d July, 1757, from which it is derived. It is this, "that it shall be lawful for Lord George Vernon and Lady Vernon, from time to time during their respective lives, when in possession of or entitled to the rents and profits of the lands limited to them for their lives, to demise or lease such parts of the lands as now are leased for life or lives, or for years determinable on the dropping of a life or lives, to any person or persons in possession or reversion, for one, two, or three lives, or for any number of years determinable on the dropping of one, two, or three lives, so as there be not any greater estate or interest subsisting at one time than what will determine on the dropping of three lives, and so as in every such lease there be reserved the ancient and accustomed yearly rents, duties, and services, or more or as great as now are, or at the time of devising were reserved, or a just proportion (except heriots, which may be varied at the will of Lord and Lady Vernon), all such rents, duties, and services to go along with the reversion or remainder of the premises expectant on the determination of such leases; and so as there be contained in every such lease a power of re-entry for non-payment of the rent thereby to be reserved." There is then the usual power of leasing the other parts of the lands for years, not exceeding twenty-one, "so that in every such lease there be contained a clause in case the rents be behind or unpaid by the space of twenty-eight days after the times appointed for the payment thereof. And lastly there is a power of leasing as to mines, with a clause of re-entry of another description. It appears that on the 5th September, 1803, Lord Vernon, then tenant for life, executed the lease in question, which contained, after the usual reservations, a covenant by the lessees to pay the yearly rent of 2*l.* by equal portions at *Michaelmas* and *Lady-day*, and to perform and pay certain duties and heriots; there was

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another reservation of a couple of fat capons, or one shilling and sixpence in lieu thereof, at the election of the person entitled to the rent—and also an heriot of the best beast, or 40s. at the like choice, and also that the lessees should do suit of mill at the will of Lord *Vernon*, or such person as should be entitled to the freehold or inheritance.

All these directions are strictly observed in the lease, and how the penner of that instrument could be enabled to be correct in those reservations, but by the aid of, or without a reference to, the then subsisting or former leases, I am at a loss readily to conceive.

That reference was, in point of fact, had; and it being found that the leases uniformly gave the tenant a respite of fifteen days for the payment of the rent, and that there was also annexed the further qualification to the clause of re-entry, that there be no sufficient distress on the premises, whereby the arrearages of this half-yearly rent of 1*l.* might be fully raised, levied, and paid; the framer of the lease of 1803 adopted the same form of reserving the power of re-entry in that instrument: and the question now is, whether this lease, containing, as it does, a clause of re-entry so qualified, is a proper and valid execution of the power created by the settlement. Whether it be so or not must depend, as I conceive, on the following considerations, *viz.* whether it be substantially conformable to the intention of the creatrix of the power—whether the objects of the annexed conditions are reasonable and legal—whether they are suitable and adequate to the object and purpose of the power—and whether in their effect, they are injurious or inconvenient to the rights and interests of the remainder-man, or person next in succession. I will not trouble your Lordships with cases to shew that powers of this description should receive a liberal construction, it must be at least admitted, that common sense should prevail. Powers of this nature pervade the settlements of all the great and opulent families in the kingdom; it is important that the

execution of them should not be avoided on a slight or immaterial departure even from a strictly prescribed form, still less, where no specific form, but only a general direction is given. Where a prudent father, tenant for life, has provided by the execution of such a power as this for his younger children, where the eldest son would otherwise succeed to the bulk of the property—if a question should arise under such circumstances, the consideration of the state of the property would dispose your Lordships to give every effect to such a power as might best accord with the intention of the creator of it, rather than permit the reversioner, by taking an advantage of an objection of this nature, to avoid the leases to the prejudice of the lessee, or to the younger branches of the family against whom he would be entitled to recover out of the assets of the lessor. So, also, would it be proper to consider whether any injury or sensible inconvenience to the remainder-man must be the necessary consequence of the execution of the power in question, still, however, with reference to the intention of the settlor.

We are first to enquire what the creatrix of this power meant by the terms which she has used in expressing this condition to be observed in the exercise of it. She has required "*a power of re-entry for non-payment of the rent,*" without prescribing, in terms, any form of words, or any particular mode in which it was to be reserved. It is a very general direction, that the lease shall contain a power of re-entry "*for*" or "*because of*" non-payment of the rent. So general a direction must leave the verbal exposition of the clause to further care, when it should become necessary, in putting it in practice, to give to it terms of greater precision no conveyancer could have framed a clause for re-entry in the very words; he must have, in some respect or other, made it more particular and precise. A power of re-entry necessarily implies a selection of one out of several powers, and the common and the statute law have furnished different modes in which such a power might be drawn. Besides, it is quite clear, from the general tenor of the instrument,

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that it was the intention of the creatrix of the power, that the person who was to make these demises should abide by the form in which the former leases had been made. This general direction necessarily calls therefore, independently of any intention, for the exercise of judgment in the execution of the power—not of legal or definite judgment; but of the fair discretion of the party to whom the execution of it was intrusted by the creatrix of the power.

It must be considered sufficient, therefore, if the lessor has provided such a power of re-entry as should be fit, suited, and adequate to the occasion, and to the legal objects of such powers, and be commensurate with them. And what are the objects of powers of re-entry, as recognized at law and in equity? They are merely coercive means of enforcing the payment of rent, and that is now the only purpose for which such clauses can be intended, or for which they can be enforced; for Courts of Equity would never have suffered them to have been inserted for any other purpose. They would always enjoin the landlord from putting them literally in execution, whenever the tenant should pay the arrears of rent and costs. The remainder-man, therefore, cannot have been placed in a worse condition by the qualifications annexed to this clause of re-entry, than he would have been in by the law, if there were no such qualifications inserted. Then, in the faithful exercise of his judgment or discretion by the lessor in the execution of this power so generally worded, he would naturally consult his professional adviser; and he again would necessarily, upon reading the terms of it, resort to the former subsisting leases of the same property, in order to ascertain the ancient rents, duties, and services, or the heriots usually reserved; for how otherwise could he do so? Could he, on reading these words, forbear to examine the former leases, where he would be sure to find the best information to direct him; and having found what were the usual rents and services, he must then consider the fit and proper clauses to ensure them; he would then seek further to learn by what provisions that had usually been

effected, and if he met with nothing there to assist him in acting agreeably to this requisition, which is much too general and uncertain to follow literally, he might think he could not do better than take the statute of 4 Geo. 2. for his guide, and adopt the qualifications which were there considered both at law and in equity to be most reasonable, as applicable to the execution of such powers.—Whilst, however, I think that the execution of the power in the first instance was left to the discretion of the tenant for life, I do not say that his discretion, if not conformable with it in any very material respect, would conclude the Courts of law; but I cannot admit that the validity of the execution of a power should be left to the consideration of a Jury, or the determination of a Court of law, in the first instance, without leaving any thing to the discretion of the lessor, and the intention of the creator of the power.

I am therefore clearly of opinion, that the former leases were properly taken as a guide by the person who was to execute the power: and subject only to the doubt entertained by very learned men, I consider them decisive evidence of what ought to be the true construction of this power, according to the intention of the parties to the settlement.

The decision of *Cooke v. Booth* (a), I am aware, has been considered to be over-ruled by subsequent determinations; but I think that case very distinguishable from the present, because the Court were there required to put a construction upon a covenant sufficiently explicit in its terms, and without any ambiguity; whereas, the terms of the requisition in this power, could not be transcribed literally as a complete covenant into a lease, without some qualification to perfect the power, and render it practicable. The creatrix has expressly required the old and accustomed leases to be consulted in many respects; and why should they not be looked at for the usual clauses which were necessarily to be engrafted upon the covenants for which that reference was directed? This

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(a) Cowp. 819.

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extrinsic evidence, therefore, was not resorted to in the present instance for the purpose of explaining the meaning of the instrument, but as a guide to direct the party who was to exercise a judgment in preparing a further instrument, according to the general requisition of a power in the former, as to the particular manner in which it was to be prepared: and where, without such additional particularity, it would be impracticable in effect; but still, so as to be conformable in substance, with the directions of the power in requiring such restrictions. I will not involve the case by adverting to any of the facts in evidence, which are beside the question, but proceed at once to the objection that has been taken to this lease.

It has been urged, that there is an obvious difference between reserving a simple power of re-entry, and one clogged with conditions not authorized by the power to demise: qualifying the right reserved, and impeding its execution. It is true, that these conditions are not made part of the requisition of the leasing power, in words, but I say they are in substance: nor do they, in effect, clog the right, or impede its execution; but on the contrary, they are more beneficial to the remainder-man, and facilitate his only accessible rights, by removing the ancient common-law difficulties under which he would have laboured, or the restraining power of a Court of equity, if these qualifications had not been introduced. Suppose a simple and absolute clause of re-entry had been inserted in this lease, how would it have availed him? He must have begun by a demand of his rent of 1*l.* at a proper time and place. It is scarcely necessary to cite *Coke Littleton* (a), to shew with what punctilious and expensive accuracy this must be done. The preamble of the 4 *Geo.* 2. sufficiently shews how much these niceties were felt as impediments;—he must then, with as much trouble and expense, serve his declaration in ejectment for a mere rent in arrear of 1*l.*, and he is immediately met, first,

(a) Sect. 233. 153. 154.



by the disgrace of such a proceeding, and then by a bill in equity, with a tender of his 1*l.* and costs. It may fairly be presumed, that it was the knowledge and prevalence of this equity, which gave rise to that statute, the object of which was to enable the landlord and tenant mutually to avail themselves in a more summary way, of the benefits which the equitable jurisdiction of the Courts of law would previously have afforded them; but I have never understood that the statute intended the power of re-entry to be absolute. Now, what better guide than the provisions of this statute could the maker of the lease in question have taken, in the execution of the leasing power? It must be recollected, that when this settlement was made, the statute had been passed many years, and the beneficial effects of its operation must have been universally felt. The objects of the clause for re-entry for non-payment of rent, therefore, being merely and solely for the purpose of securing and enforcing the payment of it; and as it cannot by law be used for any other purpose, I am clearly of opinion that the inconveniencies which have been pointed out in this case, as the necessary consequences of the two qualifications which are annexed to this proviso for re-entry for non-payment of the rent reserved, can have no existence in fact; and that the introduction of those qualifications into the power of re-entry inserted in this lease, does not invalidate the demise.

As to the authority of the case of *Coxe v. Day*, which has been relied on in support of the objection, founded on the condition of there being no sufficient distress, I shall confine myself, in my observations on that case, to what has been said by some of my learned Brothers.

I find that I have been reported to have expressed myself in terms of animadversion, certainly much stronger than I could have intended, and I believe stronger than I really did. All that I meant to say, and all that I think I did say, was, in substance, that the present was very distinguishable from that case; and that *Hotley v. Scot* was decidedly opposed to

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the doctrine said to have been established by *Coxe v. Day*, and particularly according to the note of the former case, as taken by Mr. *Butler*. I said that I considered that an express authority, deciding that the qualifications of the power of re-entry, which form the foundation of the objections taken to this lease, did not make void a lease executed under such a power. Some expressions of disapprobation may have escaped me, and probably did, of a doctrine contrary to that determination, and which I, for one, do not consider as being impugned by the ultimate opinion of the Court upon the facts of the case of *Coxe v. Day*. Of the incidental dicta attributed to Lord *Ellenborough* in the course of the argument in that case, which may be considered as adverse to the doctrine in *Hotley v. Scot*, I might have observed, while contrasting the two cases and balancing the authorities, that that great legal character, Lord *Ellenborough*, would be more likely to overlook reasons founded on equitable grounds, than Lord *Mansfield*; and all that I meant, was, to have placed the two decisions on fair and equal terms, leaving each to its own weight.

Having stated the substance of what I meant to say upon the former occasion, I now add, that I entirely agree with one of my learned Brothers (Mr. Justice *Best*) in considering, that a necessity having been imposed on the reversioner, that the rent should be lawfully demanded, was a deviation from the power, which creates a very material distinction, and very much confirms my view of it.

There are also these further very marked points of difference between the two cases.

In *Coxe v. Day*, there were no limitations of the particular estate as here;—the tenant for life had power to let all or any part of the premises for short terms absolute in possession, without taking any fine for making such leases, reserving the best and most improved rents. There were there, no terms of reference to the state of the property, or to former modes of leasing, or to ancient rents or services.

There was nothing left to further judgment or discretion, and nothing extrinsic to be enquired into; and the lessor was not referred to, nor did he require any thing as a guide in framing the leases which he might grant under the power. All these circumstances of difference wholly distinguish the cases, and make it unnecessary to advert to the doubt thrown on the decision in *Coxe v. Day*, by the determinations in *Hotley v. Scot*, and in the present case. The question therefore may be considered as unfettered by decisive uncontradicted authority, either way; and I therefore see no reason for changing my former opinion, that this lease is a valid execution of the power.

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Lord Chief Baron RICHARDS.—The question in this case arises upon a deed of settlement, made on the marriage of Lady *Vernon*, by which she was made tenant for life, with remainder to Lord *Vernon*, her intended husband, for life, with powers of leasing, which were given to each of them, as they should happen to be in possession of the premises. By one power, (the third) which enables the tenant for life to make leases of the mineral lands, no clause of re-entry whatever for non-payment of rent is required to be inserted. In the power mentioned, secondly, in the settlement, or that which authorises demises for terms of years absolute, at a rack-rent, the leases are required to contain a proviso for re-entry, in case the rent should be in arrear and unpaid for the space of twenty-eight days. Such is the qualification of the power of re-entry expressly prescribed, where the rent and beneficial occupation run together and are co-extensive, and to be considered of the same value. The power now in question (which is the first in the deed) authorizes Lord and Lady *Vernon*, as each of them shall come into possession of the premises, to grant leases of such parts of the lands as were then leased for life or lives, or years determinable on lives, for the same term, so as there be reserved the ancient and accustomed, or as great and beneficial yearly rents, duties, and services,

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or more, as had been, &c. Now it appears to me to be quite impossible to know what was to be done by the person who should have to exercise this power of leasing, so as to execute it conformably with the intention of the creatrix of it, or to ascertain what lands were then leased for life or lives, without looking into the existing legal instruments, and more particularly the then subsisting leases, and all such papers as had been executed between the landlords and their tenants, regarding the various modes of tenure of the several parts of this estate, and the general state of the family property.

At the trial, former leases were produced, to shew that the proviso so qualified and contained in the lease in question, had been, on all occasions, introduced as one of the usual conditions on which this part of the property had been accustomed to be demised: and how could that usage be otherwise ascertained? I consider that that fact was material for the consideration of the Jury in such a case as this, and it was for that purpose fit and proper that they should look into the leases which were unexpired at the time when the deed of settlement was executed; and therefore it follows, in my judgment, as a necessary consequence, that these leases were properly admitted in evidence, to prove the fact of such a proviso being usual and customary, and conformable with the ancient practice in the family, of demising the same property.

The words of the leasing power, under which this question arises, are, "and so as there be contained in every such lease a power of re-entry for non-payment of the rent thereby to be reserved." A more general power cannot be well expressed or conceived:—it is not clogged with any qualification. A power only is required, and that power is to be *for* non-payment of the rent, and not *on* non-payment thereof: which latter word might, perhaps, have been considered as having reference to the time of the accrual of the right *of* re-entry; but the word is *for*, which must be taken to

be used solely with reference to the occasion on which it was to be given.

Now, in this case, where the lessee must have paid to the lessor, in consideration of his lease, the full value of his interest at once, at the commencement of the term, exclusive only of the small nominal rent of 2*l.* a year, is it to be supposed, that it was the intention of the creatrix of these powers, to vacate, in one instant, a lease so granted for a valuable consideration, for an accidental and trivially inconvenient default in the payment of so inconsiderable a rent, where the rent and the occupation run together? That construction would have the effect of putting such tenants in a much worse condition than those who had leases under the other power at a rack-rent, and who were not to pay any thing for rent until after they had enjoyed the possession of the premises; and were then to be indulged with an extension of the time for payment of their rent, for twenty-eight days beyond the day fixed by their lease. Lord *Vernon* then, having occasion to exercise the first leasing power, and finding from the settlement, that a power of re-entry for non-payment of rent was to be contained in the lease he was about to make, inserts therein, in the execution of the power by which he was authorized to make the demise, the proviso contained in the lease in question, and which is in the following terms, viz. "that if it shall happen at any time during the estate thereby granted, that the yearly rent or sum of 2*l.* and every or any of the duties, services, &c. thereby reserved, or any part thereof, shall be behind, unpaid or undone, in part or in all, by the space of fifteen days next over or after any or either of the days or times, whereat or whereupon the same ought to be paid, done, or performed as aforesaid, and no sufficient distress or distresses can or may be had and taken upon the said premises, whereby the same, and all arrearages thereof, if any be owing, be fully raised, levied, and paid,—it shall and may be lawful to and for Lord *Vernon*, or the person to whom the freehold

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or inheritance shall belong, to re-enter." And the question for your Lordships' consideration, now is, whether that proviso is agreeable to the terms of the leasing power, given by the settlement, which directs, that there should be inserted in such lease, a power of re-entry for non-payment of rent. Two objections have been raised to it on the part of the lessor of the plaintiff; one of which is, that the time for re-entry for non-payment of the rent, has been extended in the proviso to fifteen days beyond the time authorized by the power; whereas, the right of re-entry should have been immediate and absolute. The other objection is, that the power of re-entry is required to be reserved without reference to any condition; whereas, there has been superadded to it in the proviso, a condition that the lessor or reversioner shall not be permitted to re-enter, so long as there is a sufficient distress upon the premises. The answer to these objections, as it appears to me, is, that it is clearly established, that in the construction of all powers, we are to be governed by the intention of the parties creating them; and that intention must, in all cases, be collected from a fair interpretation of the language in which they are worded. In this particular instance, all that we can collect from the words of the power is, that it was the intention of the parties to the deed, that there should be a power to re-enter contained in the leases to be made under the power in the settlement now under consideration.

The words there used are too general to afford any precise directions respecting the execution of it; and therefore the fair exposition of it must be collected from the situation of the parties under all the circumstances attending the state of the property at the time when the settlement was made.—Lord and Lady *Vernon* uniting in marriage, may be considered under their settlement, as owners of the estates, though, before marriage it was her Ladyship's property; and by the settlement, they proposed to grant leases to all

who chose to take them on the terms mentioned in the powers.

The object of the creatrix in this case, as it is to be collected from the terms of the settlement, when construed according to those rules, regard being also had to the facts, was clearly, as I think, to have the new lease planned on the old and accustomed terms of the former leases:—one of which was, that there should be a clause of re-entry, similar to the present, for non-payment of the rent, as we find from the fact of such a clause having been uniformly inserted in the former leases. It has been ruled in many cases, that Courts are to be more liberal, if any inclination may be allowed in construing leases made under powers, rather in favor of the lessee against the lessor, where the power proceeds from the owner of the inheritance, than where it proceeds from a stranger; and it has been contended, in argument, that that distinction is to be taken in this case, because the estate originally moved from *Lady Vernon*: so that *Lord Vernon*, the tenant for life, who made this lease, under the power given to him by her, is to be regarded as a stranger, he having originally no interest in the estate; and therefore, that his acts are to be construed more strictly against the lessee, and in his own favor, than if he originally had been the owner of the estate.

But we find here, on looking to the uses of the settlement, that *Lord* and *Lady Vernon*, had each of them, when in possession, the same power to grant leases;—the words are precisely the same as applied to each of them, in each particular instance. The power, therefore, though exercised by *Lord Vernon*, must be construed in the same way as if it had been exercised by *Lady Vernon*; and if so, the lease in question must be considered as if it had been executed by the person from whom the estate originally moved, and who may fairly be considered as in a situation similar to a case I am about to suggest, and upon which some of your Lordships can have no doubt,

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Suppose a landlord, seised in fee, should enter into an agreement in writing with his tenant, to grant him a lease for years on certain conditions, and one of these was, that it should contain a power of re-entry for non-payment of the rent to be reserved at the time specified. If it should afterwards become necessary to file a bill in equity for a specific performance of that contract, a Court of Equity would, upon making a decree for a lease, order it to be referred to the Master to settle the terms in which such lease should be framed. Can any one doubt, that on such a reference, the intention and meaning of the parties, to be collected from all the circumstances attending the case, ought not to be considered? The question of intention would be the only guide, where the words are the same, or as general as those which are used in this power. That Court would order the power of re-entry to be qualified with usual and reasonable conditions, such as the qualifications of the present power are. They would unquestionably extend the period for re-entry to a reasonable time beyond the day fixed for payment of the rent, referring, at the same time, to a sufficiency or insufficiency of distress, as in the present lease.

I mention this case of an agreement, because it seems to me to apply very closely to the question now before your Lordships.

Courts of Equity adopt the same principle and practice in hundreds of instances, such as leases by guardians of infants, committees of lunatics, and the like. The Court so acts, because it will execute the intention of the parties: and a Court of Law, in construing powers, is equally bound to adopt the intention of the parties creating them; nor is there any difference recognized in Courts of Equity, as to the construction of words in powers, or in other instruments, as to their effect and operation. If, therefore, Lord *Vernon* had agreed to grant a lease according to the terms of this power, and had not done so, and a

bill in equity had been filed for a specific performance, and the prayer of that bill had been decreed, the Court would, I doubt not, direct a lease to be executed with a power of re-entry, upon the usual and reasonable terms, which should be according to its construction, agreeably to the intention of the parties creating the power; and I presume, the lease to be executed under such order of the Court, would be similar to that which has been executed in this case.

I am the more willing to refer to the proceedings in a Court of Equity, because I am speaking in the presence of those who have perhaps more knowledge and experience on those subjects than any persons of the present or any former times. If, then, the Court of Chancery would have directed a lease to be made under these circumstances, in precisely the same terms, how can we now say that the lease in question is invalid because it contains these conditions? I understand, too, from extensive information, and my own experience justifies me in believing, that the practice of conveyancers, in respect to the clause of re-entry for non-payment of the rent, has always been uniformly consistent, in giving an extension of the time beyond the day of payment; and that practice is founded on an assumed intention of the parties. For that reason, the most eminent conveyancers, as we find from established precedents, have ever been in the habit of extending the time to any such number of days as, under the circumstances, they might have considered reasonable: and although so delaying the payment may in some cases be contrary to the strict terms of a power; yet, it has always been done, and it would be a just course, even if it were not the universal practice. The uniformity of the practice of proceeding on the intention ascribed, affords strong evidence of its acknowledged propriety; and it is so inveterate, that it would be highly dangerous now to affect it; and I have ever understood, that the Judges have always considered an universal, or even a very general practice amongst convey-

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ancers, a sufficient ground for their decisions;—although they might not have entirely approved of the principles on which that practice had proceeded. On that point, therefore, *viz.* the extension of the time for payment of the rent, I am of opinion that this lease is valid; and that the proviso for re-entry contained therein, is a good execution of the power. On these grounds, I have always been strongly inclined to support the lease against that objection, and I think that it ought not to prevail.

As to the other ground of objection, *viz.* that a re-entry cannot be had unless no sufficient distress can be found on the premises; I have not been able to learn that any general understanding respecting the practice of inserting such a condition in similar clauses, in respect of the execution of powers, has prevailed among conveyancers, nor can I find that any decision has taken place by which I must consider myself bound, in a judicial point of view. In the absence of all authority, therefore, I must confess that the very strong and able arguments, which were pressed upon the point, had at first very considerable influence on my judgment, and induced me to form that opinion which I have before given in this case. But, on further consideration, I am glad to find myself compelled, by more mature deliberation, to retract the opinion which I had then formed;—because I am now inclined to think, that those who then differed from me, in holding this second objection to be also unfounded, entertained the more correct view of the case; and I feel great consolation in thus having the opportunity of expressing my entire concurrence with them. Although it is true, that the condition in question would subject the reversioner to some inconveniences—and that was a consideration which, on the former occasion, weighed very considerably with me;—yet, if I am right in now holding this lease to be a valid execution of the power, on the ground that it is conformable to it, regard being had to the intention of the creatrix of the powers on the first point (which was, that the right of re-entry

to be reserved was to be reasonable in its terms), there is nothing to prevent us from inquiring further, as to whether this other condition also, viz. the absence of a sufficient distress, be not equally a reasonable qualification; and if it be, we must then hold, that it is likewise within the intention of the creatrix of the power, and therefore conformable to the terms of the requisition. Every man's experience informs him, that such a qualification of the clause of re-entry is usual in leases in general; and therefore it must be considered to be a reasonable qualification. The insertion of the same condition in all the preceding leases which were given in evidence, and I think properly admitted, proves, that in the estimation of the family it was deemed reasonable and proper, according to their construction of its import. The deed, too, which gives the power to demise, and which is the first in the settlement, requires the insertion of a power of re-entry in the leases, in the most general terms, requiring indefinitely a power of re-entry *for* non-payment of the rent,—and specifying no mode in which that power is to be reserved; neither prescribing nor prohibiting any qualification or condition, but leaving it entirely open to the discretion of the lessor. Then we find, that in point of fact, this lease does contain a clause, giving a power of re-entry *for* non-payment of rent; and under a requisition in terms so general, unrestricted, and indefinite, I cannot but consider, that a power of re-entry, with the usual and reasonable qualifications, would satisfy the condition on which such leases were to be made. By such a power of re-entry, all which the law requires to be exacted, is security for the payment of the rent: it is, as it were, penal; and these qualifications are no more than conditions which the law would require to have failed, before it would enforce the terms of the power; and if so, the conditions upon which alone this power could be enforced, are reasonable and proper, and therefore not inconsistent with the power to demise. The reason and object of these conditions are

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most assuredly, every Court must feel inclined to support the lease, which has been executed by Lord *Vernon* to the plaintiff in error. The clause objected to is reasonable, and perfectly calculated to secure the rent—it is inserted in all general leases—it is sanctioned by Parliament—it is, as I conceive, agreeable to the proceedings in Courts of Equity, which act on the intention of parties, collected from the instruments executed by them—and it is consistent with all the other leases in the family, made under similar powers.

Under these circumstances, therefore, I confess, that, on further and better consideration of this case, I am of opinion that this lease is valid; and that it is, as now worded, a good execution of the power, according to the intention of the parties to the deed of settlement.

Lord Chief Justice DALLAS.—In answer to the question proposed by your Lordships, I am of opinion that the lease in question is invalid, as not being a good execution of the power.

Two objections have been made. The first is founded on the extension of the time for payment of the rent by fifteen days; and the second, on the clause providing that there be no sufficient distress to be found on the premises. The case has been argued at the bar and considered by the learned Judges, on the double ground of authority and principle, and to each of those I shall separately advert.

And first, as to the fifteen days.—I consider, that on this point this case is untouched by authority; at least, that there is no decision entitled to be regarded as an authority, by which it is to be governed. The case of *Doe, d. Cowper v. Verney*, is of a negative nature, that is, it is one in which, although other objections were taken, this was not. On that case, I think, with great deference, a great deal too much stress has been laid; for without saying, at present, whether

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I beg here again to request your Lordships' attention to the observations which I have before made on the proceedings of Courts of Equity, as they apply to this head as well as to the former; for I conceive that those Courts would direct a clause similar to the one in question. Now, let us suppose that this had been a lease granted by *Lady Vernon*, in which case it has not been denied that it would be according to the power; because, as the estate moved from her Ladyship, she would not have been a stranger; and as the construction of the power would be more in favor of the lessee:—the lease, in its present terms, would be considered to be valid: and there can be no different construction of the same words; for in both cases, it must depend on the intention of the parties who used them in the settlement. Then, the lessees are purchasers for a valuable consideration, under that settlement; and, upon the faith of the power contained therein, have paid the value of the estate, proportionate to the term demised to them, except the small rent and the duties; and we are therefore bound to protect their interests, if consistently with the terms of the power and the circumstances of the case, we can do so:—and

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Under these circumstances, therefore, I confess, that, on further and better consideration of this case, I am of opinion that this lease is valid; and that it is, as now worded, a good execution of the power, according to the intention of the parties to the deed of settlement.

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Two objections have been made. The first is founded on the extension of the time for payment of the rent by fifteen days; and the second, on the clause providing that there be no sufficient distress to be found on the premises. The case has been argued at the bar and considered by the learned Judges, on the double ground of authority and principle, and to each of those I shall separately advert.

And first, as to the fifteen days.—I consider, that on this point this case is untouched by authority; at least, that there is no decision entitled to be regarded as an authority, by which it is to be governed. The case of *Doe, d. Cowper v. Verney*, is of a negative nature, that is, it is one in which, although other objections were taken, this was not. On that case, I think, with great deference, a great deal too much stress has been laid; for without saying, at present, whether

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the objection be well or ill founded—good or bad, intrinsically considered—I will only observe, that when it is seen how it weighs with many learned persons, now that it is taken: it seems to me that it is going a great way to assume, that if it had been taken formerly, it could not have succeeded;—and much too far to infer, that, not having been taken, it is to be considered as proof that, by common consent, it was treated as not fit to take. The more natural and rational supposition I should apprehend to be, is, that it was not adverted to at the time; at least, this is the opinion I should form; for I know not on what legitimate ground of reasoning we can assume, that what appears to be deemed so important now, was considered and rejected as utterly unfounded then. Still, however, giving to that case all the weight it is fairly entitled to, it is admitted to be but negative authority; and the question now occurring, and requiring positive decision, it must be examined and determined on express authority, if there be any—if not, then on principle.

Such then being the only case to be found as applying to the objection founded on the fifteen days, I will next consider the authorities applying to the provision as to there being no sufficient distress. Here, again, in support of the validity of the lease, one case only has been cited, as bearing directly on the point, *viz. Hotley v. Scot*. On that case I shall not waste time by dwelling longer than, in this last stage of the discussion, I feel to be necessary; and therefore, as to the imperfection of the report—the character of the reporter—the insufficiency and invalidity of the reasoning, as reported—and the other grounds of objection made by some of the learned Judges with whom I concur in opinion,—to these, I shall merely refer; repeating only, for myself, what I said upon a former occasion, and from which I am not disposed, on reflection, to retract. The particular point now under consideration, does not appear to have been adverted to in that decision, reported as it is; still, as it must have been different

if the objection then and now made had been deemed valid, I think that, in fairness, I must take it, such as it is, to be a case adverse to the opinion I entertain.

Taking it, then, as such, and trying it as an authority upon the ground of objection, to which, at present, I am addressing my observations, viz. the extension of the time to fifteen days, the first objection to it is, that it is a single case, not professing to be grounded on any which had preceded it, nor appearing to have been supported by any that have followed it; but, on the contrary, the only case which has since approached the question—that of *Coxe v. Day*—is in direct opposition to it; for so I consider it, and for reasons which I shall presently give. I need scarcely add, that a case, dissented from, as it is now, by so many learned Judges, admitted to be inconsistent with the decision in *Coxe v. Day*, and, at all events, confessedly at variance with the observations and reasoning of Lord *Ellenborough* throughout the whole of the argument in that case, can hardly, as mere authority, be considered of much avail. In opposition to *Hotley v. Scot*, as I have said it appears to me to be, is the case of *Coxe v. Day*. But here, again, I wish to deal fairly with the subject of authority. And though, to a certain degree, (and to what degree I shall presently examine) that case must be permitted to operate, still, I think, it is not to be relied on strictly as a perfect authority, even in favor of my view of the subject: first, because if *Hotley v. Scot* be rightly reported, it would be in opposition to *Coxe v. Day*; and thus we should only have case against case: and further, with respect to *Coxe v. Day*, of the two learned Judges of the Court of *King's Bench* who now support the judgment of that Court, it is disapproved of by one of them, as to the grounds on which it stands, and expressly, and in terms dissented from by the other: and, lastly, because, being a decision of the same Court by which this case was in the first instance decided, if it be distinguishable, as it is contended it is, then it does not apply; and, if not to be dis-

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tinguished, nothing of authority can result from the two cases decided by the same Court in opposition to each other.

To dispose, therefore, of the whole subject of authority, it appears to me, that though these cases, as cited, have afforded much matter for observation and argument, they furnish nothing like authority, when correctly considered, in a judicial point of view.

A word or two only, before quitting this part of the subject, on what has been much relied on, as applied to the objection of the fifteen days, viz. that the prevalence of such leases, which are according to the general practice, is to be taken as evincing the sense of the profession, and that great mischief will result from now holding the objection to be good. I undoubtedly admit that such topics are entitled to much weight, unless, if, when strictly examined, the practice should be found to have crept in against principle; (and it is not pretended to depend upon any positive authority) but I can only say, that being bound to look at and decide upon the objection, now that it is made, I must do so upon principle; and if principle and practice are at variance, the latter must give way; and in this case, as in others, if the mischief be extensive, the proper remedy, if such there be, must be sought for and applied elsewhere. This, however, at most, confines itself to the objection as to the fifteen days; for, with respect to the clause of distress, it is not pretended to be founded upon usage or practice, and the only decided case of *Coxe v. Day*, is directly the other way, holding the introduction of such a condition to be an abuse of the power, and that therefore it rendered the lease void. As far as the argument in favor of the extension as to the fifteen days is founded with respect to practice, I admit it must operate in proportion to the length of time and number of leases, in the course of which that practice has been adopted; and that becomes, for this very reason, and in precisely the same proportion stronger against the clause as to distress, inasmuch

as in all such leases, no such clause is to be found ; and my Brother *Holroyd*, to whose labour of research and profundity of learning we are all of us, at times, so much indebted, has informed your Lordships, that after a labourious search, he has not been able to find in the old books of precedents, more than one instance of such a clause as the present in a lease, and that not appearing to have been adopted or followed up in common use. Practice, in its favor, is therefore not only wanting, but is, in that respect, the other way ; and, upon that point, practice and authority go hand-in-hand.

Having made these observations on the authorities, I come now to consider the case on principle. .

And first, I admit, that if the power is to be deemed indefinite as to time, and therefore to be exercised in a reasonable manner, leaving it to the discretion of the party by whom it is to be executed to decide what is reasonable, it does not appear to me, that the giving fifteen days, in the way in which they are given, can be considered as unreasonable. In truth, I deem it quite immaterial to any real interest of the parties, or as to any substantial effect, whether twenty shillings are to be paid by the one, and received by the other, fifteen days sooner or later. And so, I apprehend, the party might have thought, had his attention been drawn to the point. But when I am told of what the party really intended, as of an independent and substantive intention, collateral to the instrument itself, and pre-existent, having caused the power to be framed precisely as it is, I can only say, I take the probability to be, if we could look to the mere matter of fact, that the party himself never entertained a precise intention of any sort on the occasion. It is said, that the substantial purposes were to be accomplished, and that the detail of execution, was of course left to others. But this supposed intention may account for all the difficulties that have arisen. Drawn as the power is, it was probably supposed by professional persons, that the former leases might

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be looked at, and the clause in question, being found there, was therefore adopted—and, I agree, reasonably adopted, if such leases were to govern, or might govern. But whether they were so to govern or not, is one of the questions in this case, and which, if decided in the affirmative, would support the lease against this objection as far as it goes; and even if decided the other way, the case will still depend on the other general grounds, and although that objection be got over, the lease may yet be deemed invalid. Fifteen days, therefore, if time might be given, I admit, I should consider as not unreasonably given.

In like manner, as to the clause of distress, I see no actual injury likely to result from it in this particular case. I agree with several of the learned Judges, that it is not probable that twenty shillings of the half-yearly rent would be suffered, if demanded, to remain in arrear, or, if in arrear, that in the case of leases upon fines, a distress to the value of twenty shillings would not be found on the premises.

But that is a way of trying the question, which is precluded by the very nature of the question itself. The providing for a particular event, not only pre-supposes the possibility, but even the actual occurrence of such an event: it pre-supposes it, purposely to provide for it; and it anticipates and adapts itself to it. The question, therefore, arises on what the parties have said and done, not on the reasonableness of doing it, or on the sufficiency or insufficiency of what may have been done—the weight and value of which we are not at liberty to consider; and therefore, without looking out of the instrument, but to the instrument alone, and searching in it for the intent, to be collected from what is there expressed, if sufficiently expressed, we must treat the question as your Lordships desire us to treat it, *viz.* as one of construction, arising from the terms of the instrument, such as it is—as to what is the legal effect of the power authorising the lease; or, in other words, whether the terms of the lease being compared with the power in the deed, it is a good exe-

cution of it ; and I agree, that in looking at the power, the intention of the party must govern, as it is to be collected from the whole instrument, construed fairly and liberally.

First, then, the power directs a clause of re-entry for non-payment of rent, and for that merely. Nothing is said as to time—nothing as to distress—nothing as to what is reasonable—nothing as to what is usual—nothing, in short, that refers to any former lease or leases whatever, so as to furnish a rule. The words “ancient” and “accustomed,” are terms to be found in the power as words of reference, applying to the rent to be reserved; but we no where find the words “reasonable” and “usual,” as applicable to the terms in which the power of re-entry is to be reserved: and therefore I think the leases are only referred to for the purpose of ascertaining what were the ancient and accustomed rents, but not for the terms in which the clause for re-entry was to be worded, or for any thing else. In the other powers we do indeed find the words “reasonable” and “usual,” but we find them unconnected with any reference to former leases, and inserted for other objects and purposes, very distinct from the object of the required power of re-entry.

Then, as to the time appointed for the payment of the rent. That time may be as definitively fixed by the happening of an event, as by any express specification of a given period, cannot, I think, be denied; and if rent be made payable on a particular day, connected with a clause of re-entry for it if not paid, I can only understand it to mean, if not paid on the day when payable. In this, there is nothing ambiguous—nothing deficient—nothing to be implied—nothing to complete what is expressed. It has not been argued, that if the lease had been drawn in the very terms of the power, it would not have been a due and valid execution of the power; but it has been said, that the rent to be reserved under the first power is merely nominal; and it has been asked, because in the same instrument twenty-eight days are given for payment on the leases at rack-rent, being a substantial and heavy rent,

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before forfeiture can attach for non-payment: could the party intend a provision so preposterous and harsh, as that a forfeiture should become the immediate consequence of a half-yearly rent of twenty-shillings falling into arrear? To that, I answer, that this suggestion of hardship appears to me to be mere imagination, and nothing more; for what real hardship is there in making an estate liable to forfeiture for non-payment of a sum so small, as, from its very smallness, not to require time to be given to pay it? Fifteen days were scarcely necessary to put a party into a condition to pay twenty shillings: and further, why it should be left to the person who was to receive the rent, to judge of what time was to be given, where no time is mentioned, rather than where the party has herself extended it to twenty-eight days, I am at a loss to conceive. If I were at liberty, therefore, to conjecture as to the intent, independently of the words made use of, my conjecture would be, that the maker of the deed intended that there should be an indulgence given where the rack-rent was reserved, therefore she so expressed herself; but as to the small rent, she meant nothing of the sort, or beyond what she has said, and therefore was intentionally silent, whereby she has excluded the possibility of supposing that any time was meant to be given, still, less, that she had left it open to the discretion of another to decide for her, what she could quite as well have decided for herself. In this particular case, perhaps, the time may be of no material consequence to the parties either way, but as applying to future cases, and involving principles applicable to the construction of all instruments, it becomes of real magnitude and importance; and, on that account, it weighs very considerably with me in forming my judgment in this case. It is not in the operation of the clause, as it would apply to the lease, treated as a valid lease, that any difficulty arises, but in the application of the lease to the power, with a view to try the validity of the lease. But for the sake of the argument, I will suppose the question to be, whether the power

might not, from its general terms, be so construed as to imply a reasonable discretion to have been intended as to time, although that would be begging the question—making the power in that view a definite, and not an indefinite one—in such case I would ask, who is to judge what would be a reasonable time? Overlooking, for the present, all the other difficulties that may arise in this respect, if I were to take for answer—the competent tribunal, according to the nature of the case—it must be then a question, what would be a competent tribunal? On the trial of this question, was it the Jury or the Judge? And again, in the result, if it were possible to ascertain which of the two might be the competent tribunal, still, that result could only be attained, as now, through the means of a doubtful and ruinous controversy. This uncertainty as to tribunal, with the additional uncertainty as to result—that result depending on the uncertainty of opinion, which must necessarily be different with different men, of which these proceedings have, in every stage, and in this House in particular, afforded ample proof and a striking instance—are a sufficient ground for rejecting so mischievous a notion. On the other hand, all inconveniences introduced by holding the power to be indefinite, might and would have been at once avoided, by framing the proviso in the lease in the plain words of the power itself. One way, it would be certain: the other opens, at least, to much question: and it is this substitution of uncertainty for certainty—this vague rule of discretion, which throws open the gate to litigation, that otherwise would be closed and fastened against it—that constitutes my fundamental objection so to understand and so to construe this power. If therefore, the question were, whether the term “reasonable” should be implied or not, I should hold that it ought not to be implied, even if we were at liberty to imply it, in a power framed as the present is.

I come now to the second objection; and though, in one light, it is the most material, yet, it will not be necessary,

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in this last stage of the proceeding, to discuss it at any length. I mean, the restraining the right to re-enter, in the case of there being no sufficient distress to be found on the premises. With respect to this, all I have hitherto said as to time, applies with increase of force. It is a further clog, not warranted by the original power; and it is one, which does not rest on a possible speculative inquiry merely. The case of *Rees, d. Powell v. King* (a), so often referred to, affords a practical comment on the nature of such a condition; for, when resorted to as a remedy, it shews the wrong which may result. There the lessor of the plaintiff failed, because some obscure corner of the premises had not been searched; and what right has the tenant for life to expose the remainderman to such peril?

That case is precisely this, and in a similar proceeding, the effect would have been and would again be the same. Then, in support of the validity of this objection, the case of *Cox v. Day* (b), is, as I think, in point. It is so, as I conceive, in the decision, and it is so, beyond all doubt, in what was said by Lord *Ellenborough* throughout the whole argument in that case, and which leaves no room for inference. Whether that case may be fairly distinguished or not in any respect, I have already examined, and will not repeat.

The argument drawn from the statute 4 *Geo. 2.* and from the general notion of such a clause being considered as a mere security for rent, was brought forward then as now; but it was mentioned only to be over-ruled, the point not appearing to the Court to be sufficiently tenable to admit of discussion.

To one or two other points I shall now shortly advert. I can scarcely think, that the question can be reduced to one of mere verbal nicety; but if it were, I cannot myself perceive the difference taken in this case between the words "on" and "for." "For non-payment of rent," I consider to be equivalent to "on non-payment of rent;" I have, however, no hesitation in ad-

(a) *Forrest*. 19.———(b) 13 *East*, 118.

mitting that *on* and *for* may be sometimes different, and sometimes synonymous in sense, this depending on the context and subject-matter. But looking at the subject-matter, and taking the whole of this instrument into consideration, I think there is no reason for distinguishing them on the present occasion. In like manner, as to the term "beneficial," I conceive it to refer to the lessor or the remainder-man, and not to the lessee: and, being so understood, if there be any weight in the observations I have hitherto made, such a reservation would be less beneficial to the lessor than the direct clause, unclogged with any conditions as to time or distress. On the argument, that under the words of reference to former leases and reservations, which it was contended, must be taken to refer to them for all purposes, and that therefore those former leases might be looked at, it seems to me, that the argument turns the other way.

The power directs that there be reserved "the ancient and accustomed rents, or as great and beneficial rents, duties, and services, &c." thereby letting in, I admit, the former leases as evidence of what rent was ancient and accustomed, and so, as to duties and services: but the deed following up those general words with special and particular words, shew the inference that it was not intended to affect the clause as to re-entry, there being particular words specially providing for this right, and in terms denoting how it shall be reserved, it must be taken to exclude them for all other purposes.

Having mentioned the former leases as being admissible only in these respects, I will merely further say, I think they were not admissible, except for the purposes as to which they expressly, or by necessary implication refer. This is, indeed, a necessary consequence of all I have already said; and without, therefore, going at large into the wide field which the argument in this respect has occupied, but referring generally to the opinions and reasoning of those who think as I do, I will merely state the broad ground and leading principles of law on which I found my opinion—which are, that there

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being no ambiguity in the terms of the deed, and no mention of any time to be given, nor any reference to former leases as connected with this subject, nor any such generality of expression as to let in extrinsic evidence to restrain or qualify, or to exclude; but as all is expressed with a clear, specific, and definite sense and meaning, such evidence is not admissible.

This conclusion, it will be admitted, must follow, if the premises are well founded;—but whether they are so, or not, depends, as far as my opinion goes, on the validity of the general grounds on which that opinion rests, and of which it is for your Lordships ultimately to judge.

Lord Chief Justice ABBOTT.—I am of opinion, that the demise of the 5th September, 1803, is not invalid.

The objection, upon which it is now sought to avoid the lease in question is, that the clause of re-entry for non-payment of the rent, is not such as is required by the settlement; and this, for two reasons. First, because it allows to the tenant fifteen days for payment of the rent beyond the days mentioned in the lease: and, secondly, because it is restricted to those particular instances wherein no sufficient distress or distresses can or may be had or taken upon the premises, whereby the same, and all arrearages thereof, if any be, may be fully raised, levied, and paid. This objection is certainly *strictissimi juris*, and as such, is by no means to be favored; though, if the *strictissimum jus* be found upon due consideration to be with the objector, a Court of law is bound to yield to his objection. As I have already intimated, I think the right in this case, is not with him. In the course of the argument at the bar, your Lordships' attention was called to a supposed distinction in the construction of powers, between such as are created by the owner of the inheritance, limiting a partial estate to himself, to be exercised by him as owner of such partial estate, and such as are created by the owner of the inheritance, to be exercised by a stranger, to whom he

may have limited a partial estate, or to whom he may have given the power, as a naked power, unconnected with any estate in the land.

Such a distinction appears to me to be inapplicable to the present case, because the owner of the inheritance has here limited a partial estate, first, to a stranger, and secondly, to herself; and the words of the power must have the same meaning, whether the question had arisen upon an execution thereof by the stranger, or by herself. It was also argued, that the power of leasing being for the benefit of the tenant for life, the qualifications and restrictions imposed upon the exercise of the power are for the benefit of the remainder-man; and therefore, that the clauses of qualification and restriction are to be construed most beneficially for the latter. This point also appears to have little weight, because, adverting to the amount of the fine paid upon the surrender of an existing lease, and to the amount of the rent reserved, I think it cannot be supposed that the purchaser of the lease in question would have given one farthing less, if the clause of re-entry had been strictly confined to non-payment of the rent at the very day, or that the estate of the remainder-man would now be worth one farthing more, if such lease had contained a clause to that effect, instead of the clause upon which those objections have arisen.

And, being of opinion, that the tenant for life could derive no benefit, and that the remainder-man sustains no prejudice, as to the value of his interest, from the form in which the clause of re-entry is framed in this lease, I think a Court of law may reasonably regard the interest of the tenant, the purchaser of the lease, and put such a reasonable and liberal construction upon the words of the power in the settlement as will give effect to the lease, rather than yield to critical forms and subtle objections, adduced for the purpose of defeating it. And this becomes the more important, if it be true, as has been suggested, that many leases are in existence containing clauses similar to the present, and derived from

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powers expressed in language similar to that of the power from which this lease was derived.

Considerations of this nature, certainly ought not to controul or vary the sense of plain and unambiguous words; but they may be reasonably entertained for the construction of words of doubtful import—not merely by reason of the consequences of a decision in a particular case, affecting numerous other cases of the like nature;—but because the fact suggested, is evidence of the general opinion entertained by professional men upon the meaning of the words of a legal instrument. These words, in the present case are, “a power of re-entry for non-payment of the rent thereby to be reserved.” And the first question is, whether these words may be understood to mean a reasonable power, or must be confined to a strict power, without any conditions, which the landlord may exercise, if the rent be not paid at the very day it is due, and without regard to any property to be found on the demised premises, upon which he may levy his rent, and thereby compensate himself at his tenant’s expence, for such tenant’s neglect? If the words may be understood to mean a reasonable power, the only remaining question will be, whether the power of re-entry contained in this lease be reasonable or not.

I shall proceed, in the first place, to shew, that in my opinion, the words in question may be understood to mean a reasonable power.

Non-payment is a mere neglect or default; and if the words “a power of re-entry for non-payment of the rent,” are to be taken strictly and *ad literam*, they will import a power of re-entry for the mere neglect or default of the tenant; but this cannot possibly be their legal import or effect; because, by the common law of *England*, a landlord never could enter for the mere neglect or default of his tenant in this respect, under any power or clause, in whatever language expressed. Some act is also required to be done by the landlord, in order to entitle himself to exercise his

power ; and this is required, to prevent the tenant from being surprised or injured. This act, at the common law, was an actual demand of the rent on the part of the landlord ; and that law required the demand to be made in a most precise and particular manner. It was to be made just at the close of the last day of payment (allowing the tenant the whole of the day to prepare his money) at a time when so much day-light remained as might be sufficient to view and count the money, and no more. It was to be made at the door of the demised messuage if there were any on the premises ; and if there were none, then at such usual and notorious place of resort, as the tenant might be reasonably expected to be found, if he were not altogether absent ; and it was to be of the precise sum then accruing due, not including any former arrears, all of which, although due, and recoverable by distress or action, were considered as waived by the landlord on a question of forfeiture, by his prior neglect to demand or enter for them.

Then, if the words of the power, or rather of the qualification of the power, contained in the settlement, cannot receive a literal construction, and be held to apply to a case of neglect or default, only according to their literal purport, they must receive some other and different construction, which must, in my opinion, be a reasonable construction, and one properly suited to the object and purpose in view, that is, to secure and enforce the payment of the rent ; so that, on the one hand, the tenant may not hold the land without payment to the prejudice of the landlord, nor on the other, be dispossessed of it, if either himself, or the land, which is emphatically said to be debtor for rent, presents payment, or the means of payment, without unreasonable delay or prejudice to the landlord.

It has been objected, however, that if the literal or strict meaning of the words be not adopted, no other meaning can be given ; because, as it was said, Courts of law cannot say what is a reasonable power or clause of re-entry. But I conceive, that in this, as in all other cases, they

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can find out what is reasonable, and that in some instances they are absolutely required to do so. In many cases of a general nature, or prevailing usage, the Judges may be able to decide the point of themselves; in others, which may depend upon particular facts and circumstances, the assistance of a Jury may be requisite; and whenever such assistance is required, there are ready modes of obtaining it.

I will mention one instance, in which Courts of law are required by the legislature to discover and decide, if the point be litigated, a question upon the reasonable execution of a power. By the General Inclosure Act (a), a rector or vicar is enabled to lease his allotment, under certain restrictions mentioned in the act, and amongst others, "so that there be inserted in the lease, power of re-entry on non-payment of the rent or rents to be thereby reserved within a reasonable time, to be therein limited, after the same shall become due." A lease of such an allotment, must therefore provide, that if the rent be unpaid for some specified number of days or weeks after the day of reservation, the rector or vicar may re-enter; and if any question should arise, whether the number of days specified in a particular lease, be or be not a reasonable time, the Courts of law must necessarily find some mode of deciding the question.

For these reasons, I am of opinion, that the words contained in the clause in question may, and ought to be understood to mean a reasonable power of re-entry; and taking this to be the legitimate meaning of the words, I proceed to shew, that in my judgment, the power of re-entry contained in this particular instance of the lease in question, is a reasonable power.

Usage is of great weight in considering what is reasonable, and it cannot be denied, that the power of re-entry, as expressed in this lease, is, in form and substance, such as was frequently found in leases before the execution of the settle-

(a) 41 Geo. 3. c. 109. s. 38.

ment by *Louisa Barbara Mansel*, which was in 1757. This is a fact which must have been in the knowledge of some of your Lordships, without recurring to the special verdict for information as to the leases of this particular estate. If any space of time could be allowed beyond the days of payment prescribed in the reservation, the space of fifteen days, which is the period allowed in the present lease, will not, I am persuaded, be thought an unreasonable space of time. Indeed, although this objection was pointed out, it was not so much insisted upon at your Lordships' bar; nor could it be in the construction of a settlement allowing twenty-eight days for payment, in leases, to be made at a rack rent.—The main stress of the argument, was applied to that part of the clause in the lease, which narrows the power of re-entry to cases wherein no sufficient distress can or may be had and taken upon the premises, whereby the rents and services, and all arrearages thereof, may be fully raised, levied, and paid.

Upon this part of the argument, the case of *Core v. Day* (a) was cited and relied upon. It has, however, been discovered, that the decision in that case is contrary to a prior decision of the Court of *King's Bench*, in *Hotley v. Scot*, reported in *Lofft* (b), and of which a more correct MS. note was also cited (c). This earlier case was certainly unknown to the counsel who argued *Core v. Day*, and probably to the Court also; so that the decision in *Core v. Day* is not wholly free from question as to its own particular circumstances. It was certainly not thought applicable to the present case by the two surviving Judges of the Court when it first came before them; and that case is also distinguishable from this by the difference of the language of the clause upon which it arose; for in that case, the words of the clause were not general, as here, viz. "a power of re-entry for non-payment of the rent"—but special—"a power of re-entry, if the rent be behind for the space of twenty-one days;"

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(a) 13 East, 118.——(b) Page 316.——(c) See ante, page 346.

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which latter words do not so easily admit the introduction of any other qualification or matter, as the general words of the clause now under consideration. So, that, upon the whole, the case of *Coxe v. Day* does not appear to contain a decision precisely in point to the present, and therefore in respect to authority, the question still appears to be left open,—whether, in the absence of any words denoting a contrary intention in the mind of the framer of the clause, a restriction of the right or power of re-entry to the absence of a sufficient distress, be a reasonable restriction in a lease like the present; for if it be, then a right or power so restrained is a reasonable right or power of re-entry; and the introduction of such a power into the present lease, is a good execution of the leasing power contained in the settlement.

Such a restriction of the right had prevailed in practice before the execution of this settlement in 1757. It was known and in use, though probably less general or frequent before the passing of the statute 4 Geo. 2. c. 28, in 1731. If the effect of that statute be, as at least one very learned person has thought (a), to alter entirely the common law, and to take away the right of re-entry, under any circumstances of demand and refusal of the rent, where a sufficient distress can be found—then, certainly, the express introduction of the words of restriction cannot invalidate the lease, because it is only an expression of a matter tacitly contained and implied by operation of law. But, supposing the statute not to have this effect, still, in my opinion, the restriction is reasonable in itself, in a case like the present. The instances of proceeding at the common law by demand of the rent, since the statute was passed, are very few. The proceeding is in itself troublesome and difficult, as will appear by the circumstances required, which I have already mentioned. It was, indeed, so precise and peculiar, and found to be attended with so little benefit to landlords,

(a) Mr. Baron Wood.

that the statute was passed for their relief, substituting the absence of distress in the place of demand. Can it then be said, that the reversioner is unreasonably restrained or prejudiced, by the introduction of a matter which the legislature has thought generally beneficial to landlords, and which, in all probability, he himself would have adopted, even if the terms of the lease had been such as to have allowed him to act otherwise? I say, that in all probability, he would have adopted it, because, I presume, his only wish, like that of every other reasonable person, must be, to obtain the payment of his rent in the most easy and speedy manner; and whatever difficulty there may be in viewing a messuage or farm, so as to ascertain whether sufficient be found upon it to answer the arrears of a rent, bearing, as in this case, a very small proportion to the annual value of the tenement;—still, I have the authority of the legislature, and of the experience upon which the statute was founded, for saying, that this difficulty is less in practice, than that of making such a demand as would authorize a re-entry at the common law. If any thing more be desired by the reversioner than a speedy and easy mode of securing and enforcing the payment of the reserved rent, I should say, that he desires more than the framer of the settlement intended to give, and more than the law ought reasonably to allow.

The power of re-entry, in whatever words it be expressed, can be exercised only in one of two modes, viz. either by making a demand of the rent at the common law, without regarding the value of the distrainable goods on the premises, or by ascertaining that no sufficient goods are to be found there, without regarding a demand of payment.

For the reasons already given, I think the latter must be considered as the most effectual and beneficial mode, and therefore, speaking generally of cases of this nature, I can discover no reason for resorting to the former, except a hope (certainly not entertained in this particular case), that the tenant being taken by surprise, and not expecting a demand,

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may not be prepared for immediate payment in money, and a desire to take advantage of his want of preparation, and deprive him of the residue of his term, or harass him with a law-suit. To such a motive, a Court of law will never lend its aid—and a construction calculated to give effect to such a motive, would be contrary to the general principles of law; and it ought not to be omitted, that the present question arises upon the construction of that part of a leasing power, which is intended to create a forfeiture of the lease executed under the power. It is said in our books, that forfeitures are odious in the law; and this is the reason assigned for requiring so much formality and precision in the demand of the rent at the common law; and for the same reason, in addition to all the others with which I have troubled your Lordships, I think such a construction ought to be put upon the words of the settlement as will tend rather to the exclusion than to the introduction of forfeitures of the leases to be granted under it. For these reasons, I am of opinion that the demise of the 5th September, 1803, is not invalid.

The LORD CHANCELLOR (a).—This question is undoubtedly, in every point of view, one of the greatest importance. It is of very considerable consequence to the parties immediately interested, and to others whose rights depend on the result of your Lordships determination, whether you shall pronounce the lease in question, which is fully stated in the special verdict, to be valid, or invalid. If it be decided to be invalid, it will, as we have been informed, give rise to many other cases of a similar nature, and therefore, not only is every tenant who holds under a lease founded on a similar title, deeply interested in the decision, but the consequences are not confined to their interests only—as lessees under such demises, which are said to be very general, would severally have a right to recover an equivalent

(a) Lord Eldon.

over, against the assets of the original lessor, as was the case of the *Queensberry* leases. Beyond those considerations, the public interest also demands your Lordships peculiar care, as such interest is materially involved in the result of this case, which is to furnish a principle for future determinations, and which renders it of the utmost consequence that it should be rightly decided. If, therefore, I could hope or expect that I might be brought to change the opinion which I have long entertained on this question, or be enabled, consistently with the time and attention required by my other important duties, to arrange my sentiments in a more methodical shape and better form, I should be desirous of taking further time for delivering my more deliberate opinion at a future day, when my judgment should have been more matured by the fullest consideration.

Differing, painfully, as I do, from many of those for whose talents and learning I have every reason to entertain the highest esteem, I am inclined, in so doing, to treat their opinions with the most profound respect. Otherwise, I must confess, that the course and habits of my professional life have so disposed my mind to consider such questions as those now before your Lordships, that it gave me at first very much surprise to find, that on some of them there should have existed any doubt or difference of opinion. As to the authorities which have been cited, as applicable to this case, we have been referred to that of *Hotley v. Scot* (a), and the conflicting decision of *Coxe v. Day* (b), besides the negative authority of the case of *Jones, d. Cowper v. Verney*, before Lord Chief Justice *Willes* (c), who, I may observe here, was certainly a very great common lawyer: and I avail myself of the information respecting the two former cases which has fallen from the two Lord Chief Justices of the Courts of *King's Bench* and *Common Pleas*, in the impression which I am to permit myself to receive from those

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(a) *Lofft*, 316. — (b) 13 *East*, 118. — (c) *Willes*, 169.

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determinations, with the further authority of the late Lord Chief Justice *Ellenborough*, and Mr. Justice *Bayley*, who have before given their opinions on the point, in the judgments pronounced by them in this very case. But I cannot admit, that all the authority which the subject-matter is capable of receiving, has been brought forward on this question. It has been soundly urged, that the practice of professional men, by whom the conveyances of the real property of this kingdom, have been devised and prepared for a long series of years, is a sufficient ground for supporting a doubtful proposition of law, and that but for the consequences of shaking titles to property, the Judges of the Courts of *Westminster Hall* have frequently declared, that if certain points depending on such established practice had been *res integra*, they would not have assented to the doctrine to which, in the particular cases, that practice had given the sanction of authority. But Courts of law, should, as I think, go still further than they commonly do, in considering questions of this nature. They should enquire of decisions in Courts of equity, not for points founded on determinations merely equitable, but for legal judgments, proceeding upon legal grounds, such as those Courts have for a long series of years been in the daily habit of pronouncing as the foundation of their directions, orders, and decrees. From the year 1772 to 1780, which I consider as the most profitable period of my life, I passed my time in the office of a conveyancer, where I became acquainted with the practice and opinions of the most eminent men of that time, and I know, that in those days, if it had been required that a lease should be prepared under such a leasing power as this, given by a marriage settlement, it never would have occurred to any one who possessed any knowledge on such subjects, to have questioned, whether the introduction of a delay of fifteen days in the clause providing for the power of re-entry, would render the lease invalid for non-conformity with such a leasing power. And that, I think, may be fairly urged, in considering what may

be termed the unwritten authority applicable to this case. Practice in this respect is evidence of what is reasonable. Such marriage settlements as these are often framed in very different ways. In some, the tenants for life are the persons to whom the power of making leases is wholly entrusted. But as one great object of giving such power, is to ensure the due management and cultivation of the estate, it is often in well drawn settlements, given to the trustees to preserve contingent remainders, to provide against such cases as these, where the father and mother die, and leases are necessary to be made for the advantage of the estate; and therefore the inheritance and legal estate is often given to trustees for the purpose of making leases during the infancy of the *cestui que use*, and then the trustees to preserve contingent remainders; or the trustees of the inheritance, having no interest, are empowered to make such leases. The form and usage of practice, as it regards such leases so made by the trustees, must necessarily have very considerable weight in determining the conditions on which such leases should be granted. In the majority of such settlements, no mention is made of any period to be allowed the tenant for the payment of the rent; and yet, in almost all the leases under such powers, a certain number of days is given,

Many leases under such powers, too, are made under the direction and sanction of the Court of Chancery;—and of such leases, I will say, in vindication of those who have been my predecessors, and of those who may succeed me, although not for myself, that in all cases of leases directed to be made by the Chancellor, the form in which they have been so directed to be made, is an authority of law, for saying that they have been made in the due execution of the several powers; for he is the competent authority to say whether they are drawn according to the powers or not. He is a Judge both of law and of equity, and invested as he is with competent authority, it is his opinion which must decide whether such leases are made according to the legal

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construction of the language of the power, and its legal effect.

Can then recourse be had to a better source in judging of a question of this nature, than the practice and decrees of the Court of Chancery? Let me suppose, that in the present case, the Chancellor was called upon, in his judicial character, by these parties, having contracted for a lease to be made by virtue of this leasing power, and the person claiming to have the lease, had filed a bill for the specific performance of such a contract; and suppose the Chancellor should decree a lease to be made, he would, in pursuance of the established practice of his predecessors, direct the lease to be made with a power of re-entry, worded as this clause is, giving the tenant an extension of the time within which he must pay his rent. It would be the Chancellor's province to determine ultimately, whether the extension of time so given, was reasonable, and whether, in all respects, the lease so directed to be executed, was within the terms of the power. And here, I venture to assert, that in all the cases of that nature which have come before my predecessors, their decisions are entitled to be considered of as much authority, nay, even more so, than any others which have been stated to your Lordships. As I am now upon the subject of authority, it may not be improper to observe, that there are certain cases in which the legislature has adverted to reasonable time, as being a well known subject-matter of legal recognition. Upon the division of commonable lands under Inclosure Acts, there are always amongst those who have claims, a class of persons entitled to considerable allotments, in which they have only estates for life :—I mean rectors and vicars. They are authorized by the General Inclosure Act (a), to make leases of their allotments for any term, not exceed-

(a) 41 Geo. 3. c. 109. s. 58. The words of that section are, "So as there be contained in every such lease, power of re-entry on non-payment of the rent or rents thereby to be reserved, within a reasonable time, to be therein limited, after the same shall become due."

ing twenty-one years; but it is provided, that in such leases there must be power of re-entry on non-payment of rent within a reasonable time. That has been acted upon, ever since the statute passed, and in such leases it has been the universal practice to give the tenant a certain number of days, precisely in the same manner as has been done in the present instance. Now, let me ask what difficulty can Courts of justice have, in deciding what shall be considered a reasonable time, when the legislature has so expressly recognized it as a well known incident to such leases? I must say, that in my opinion, it would be most unreasonable to say, that Courts should hold that fourteen or fifteen days given to a tenant for the payment of his rent before his lease should be forfeited, would be reasonable in the case of a lease made by a rector or vicar under this Inclosure Act; but unreasonable in one made by a tenant for life under such a power as the present, in an ordinary settlement (the form of which has been adopted, and transferred into this clause in the act, to enable the person to demise the allotment), and a direct breach of the terms of the power contained in that settlement. In this case, independently of the practice having been always founded on the principle that such a power of leasing as this is, admits of the superadding these legal and reasonable conditions to the right of re-entry, a contrary decision proceeding from your Lordships, would be one of the most mischievous in its effects that ever was pronounced. Taking it that this special verdict contains every thing which ought, for the purpose of this question, to be found, I see nothing in the case which requires such a decision. An argument has arisen, which has been much pressed at the bar, on the admissibility of what is called extrinsic evidence. But, in this case, I think that the evidence which has been admitted, was not only admissible, but necessary and unavoidable; for we could not come to a proper conclusion, through the medium of what is contained within the four corners of this instrument only, without having recourse to others. We are re-

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ferred to them by the deed itself, and we must necessarily resort to them to obtain the meaning of the power. In this case, there were existing leases in the year 1757, the time when the settlement was made, and that instrument not only refers to those leases, but it does so in the very part wherein the leasing power is given. They must necessarily be referred to, and in all their parts, in order to understand the object of the creatrix of the power, before it can be known in what manner it should be executed, so as to be conformable with her view and intention. I do not mean to say that we should go beyond that, to leases which had been made of the property before that time, or look further than to the leases then in existence, in order to become acquainted with the state of the property at that period; but we are directed to resort to them for that purpose; and if they shew that a system of leasing adapted to the then state of the property was pursued, it is impossible to shut our eyes to that evidence, proving, as it does, that the power was intended to be accommodated to the then state of the property.

Having made these general observations, I must now call your Lordships attention to the facts of the case:—A lady named *Louisa Barbara Mansel*, afterwards *Louisa Barbara Vernon*, was tenant for life of the estates, with several remainders over:—The will under which she claimed as tenant, contained a power in her, in consideration of marriage, and either before or after her marriage, of revocation and appointment, as was afterwards pursued by her in the marriage settlement. The special verdict then states, that on the 2nd July, 1757, she intermarried with Mr. *Vernon*; that before the marriage upon that day, she, by her deed, revoked all the uses and devises contained in the will of Lord *Mansel*, concerning the said premises, and appointed and limited the same to the Earl of *Guildford* and *Charles Montagu*, and their heirs, in trust to hold the same, after the said marriage, to the use of the said Mr. *Vernon* for life, without impeachment of waste; remainder to the said *Louisa Barbara* for

life, without impeachment of waste; and after the determination of those estates, or either of them, by forfeiture or otherwise, in the life-time of the said Mr. *Vernon* or *Louisa Barbara*, or the survivor of them, to the use of the said Earl of *Guildford* and *Charles Montagu*, and their heirs, to preserve contingent remainders, and to permit Mr. *Vernon* during his life, and afterwards the said *Louisa Barbara* during her life, to take the rents, &c. and after the decease of the survivor of them, to divers other uses, for the benefit of their issue, and in default of issue, to the use of the will of the said *Louisa Barbara*, and subject to the powers and limitations to be thereby directed and appointed; and, in the mean time, to the use of the said *Louisa Barbara*, her heirs and assigns for ever; and then follows the clause upon which this question principally arises. Before I state that, I will take the liberty to mention another head of authority, which I confess has influenced me a great deal with respect to the clause as to the fifteen days. By a statute made some years ago (a), the legislature authorized the committees of lunatics, by authority of the Court of Chancery, where those lunatics were tenants for life, with powers of leasing, to make such leases as the tenants would have made if they had been of sane mind, and I never had the least doubt under that statute, in directing a committee to make leases, with this ordinary reservation of a power of re-entry for non-payment of the rent for fourteen or fifteen days, with respect to the time of forfeiting the estate. So, if a rector or vicar, having an allotment under an Inclosure Act, had become a lunatic, the Court would have acted in the same way as to the leases of such allotment; and but for the opinion which I understood had been delivered in the Exchequer Chamber, in this case, I should never have had any doubt as to the propriety of it. It is very material to consider, in construing a power of this nature in a marriage settlement, that it is part of the contract which all the parties to such settle-

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(a) 43 Geo. 3. c. 75. ss. 3 &amp; 4.



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ment have entered into with each other; and when we come to settle questions which arise between the temporary landlord and the tenant, on the construction of leases granted under the power, we must consider the landlord as having acted *bonâ fide* on the behalf of all the parties interested in the inheritance under the original deed, and they are not to be encouraged by Courts, in being astute to find out matter of forfeiture, or to be suffered to defeat the leases by mere matter of misconception, if, upon a fair construction, they may be supported.

We must not overlook, that a considerable fine has been paid in consideration of the lease in question, and that is, in fact, a payment of rent. It is a render of so much rent in advance, and at once, instead of a future succession of payments from time to time, and the small annual rents and other services reserved, are comparatively of very little value. With respect to the lands to be let at rack rent, for years absolute, it is very easy to reserve a power of re-entry—and the third is of mines—with regard to which, unless the conveyancers of modern times are much more able than those of the last century, and have some mode of dispensing with what was formerly considered indispensable, they must necessarily be obliged to look into the existing leases in the first case, and into such as are usual in the last, to all of which, the deed has in one part or another referred them, in order to prepare the leases in such a form as the settlor has required to be observed by the persons who were to frame them, as to the proper and reasonable modes of working such mines. There is another very important requisition in the first leasing power, to which it is very material that I should direct your Lordships' particular attention. On every lease for a life or lives, it requires that there be reserved during the continuance of the estate demised, the ancient and accustomed yearly rents, duties, and services, or more, or as great or beneficial yearly rents, duties, and services, or more, as now are, or at the time of demising or granting the pre-

mises so to be demised, were reserved or made payable in respect of the same respectively, or a just proportion of such ancient or the present reserved rents, duties, and services, or more, according to the value of the premises so to be demised, leased, or granted respectively—and then come the exceptions with respect to the heriots, and the usual clause that these rents, duties, and services were to be for the benefit of the persons entitled from time to time. If, therefore, a lease was to be made after the year 1757, of premises, which in that year were held under an existing lease;—and I do not wish to carry it further back than that period, it is impossible to say, that under this power, regard is not to be had to that lease. In construing the object of the power according to the intention of the maker, we are bound to receive in evidence that to which the language of the power so expressly refers. It is there to be ascertained what is to be demised according to the ancient and accustomed rents. But can any thing be stronger than these words? Not only are there to be reserved “the ancient and accustomed yearly rents, duties, &c. or more,” but as “great *or* beneficial rents, duties, and services, or more, as now are, or at the time of demising the premises so to be demised, were reserved.” I am entitled to say, that this word *or* should be understood as if it were *and* in this case; and in the next leasing power we find the words used are “as great *and* beneficial rents,” which I consider gives to the word “beneficial” a signification of great importance, when read with a view to collect the intention of the framer of the instrument as to the execution of this power; and under a deed so referring to existing leases, and in such terms, I have great doubt if this proviso in the lease as to the distress had not been framed just as it is, whether, for that reason, the lease would not have been bad; for it is not, as has been truly said, so much the quantum of the rent, as the principle of the reservation of it, to which regard must be had in determining questions of this nature: the

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word "more" relates to the amount beneficial to all deeds, incidents of the reservation of the rent, and particularly to the security for the payment, and it is only required to be as beneficial as the existing reservations were. Now, if the same rent be reserved in the same manner, is it not as beneficially reserved? The same rent may be reserved in a different manner, and not as beneficial to the inheritance. By the words following "and so on," occurring in that part of the settlement where the best and most improved yearly rent that can be obtained is required to be reserved from half-year to half-year, *de anno in annum*, the creation of the power expressly says, that for non-payment of that rent, there shall be no re-entry until the tenant shall have been absent twenty-eight days after for the payment of it. In the case of the first power, certainly, there is no mention made of any time, within which, beyond the day of reservation of the rent, the arrears may be paid. But is not a power to re-enter, if the rent shall be unpaid for the space of fifteen days, a power of re-entry reserved? And is it not reserved for the non-payment of the rent? It is not an absolute power, but it is a power; and where are there any words in that part of the deed, which direct that it shall be an unconditional power? There is no such thing expressed in this part of the instrument, although, in a future part, we find it expressly directed to be reserved conditionally.

Previous to the agitation of this question, (such is the consequence of what my professional habits have been, as I have before said) it would have very much astonished me, to have been told, that the superadding these two qualifications to a proviso for re-entry reserved in a lease under this general power, would have the effect of rendering the instrument invalid; and if, sitting elsewhere, I had been called upon to decide, that the tenant filing a bill for a specific performance of a contract for a lease under this power, could have no other than such a one as should contain a peremptory clause for re-entry, in case the rent should not be paid on the day

appointed, I should have held it contrary to all the principles of law to turn him out of Court for refusing to accept or execute a lease with such a proviso. I can see no reason why there should be any difference made in leases at a rack-rent, and those for which an equivalent consideration has been paid in the first instance by way of fine, provided it be as beneficially reserved, which alone would be sufficient to make it a good execution of the leasing power.

What I have hitherto said on the condition of the delay of fifteen days, certainly does not touch the other alternative of there being no sufficient distress upon the premises; unless your Lordships shall be of opinion, that the power of re-entry directed to be contained in the lease, must be taken to be a reasonable power; and, if (it having been the constant and uniform course in the practice of conveyancing, as sanctioned by the Courts, to apply that quality to such a condition, and accordingly to insert it in every lease) it must now be deemed in law to be a reasonable condition—in that case, the observations I have already made, will so far apply to this second objection. The term “reasonable” is certainly not applicable to the *quantity* of the rent to be reserved; but it is wholly restricted to the beneficial reservation of that rent, be it what it may, as it affects the security of payment whenever the rent should become due. Although I do not agree to the extent of the proposition laid down by a very learned Judge, who, I think, is as old in the law as myself, I mean my Brother *Wood*, who has stated it as his opinion, that the statute 4 *Geo. 2.* is imperative on landlords, as to their adopting, in all cases, the remedy there furnished; yet, upon the construction of that statute, and of the General Inclosure Act, to which I have alluded, it is sufficient for the present purpose to observe, that they furnish abundant authority for holding, that the insertion of such a condition in a clause of re-entry, is warranted as being reasonable, and that its introduction therefore, may be considered as no objection to a

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power of re-entry so qualified, but that it may, notwithstanding, be deemed a good execution of this leasing power. Having already called your Lordships' attention to the extreme importance of the general effect which the decision in this case will have upon the whole class of tenants holding property under this sort of tenure, and whose leases are for the most part, if not universally, founded on titles and framed in words which will render them liable to these same objections, I wish it to be understood, that it is not now to be considered by your Lordships, in deciding this question, whether leases of this nature are more beneficial either to the remainder-man or the tenant for life; for that is not the principle on which this case should be decided. The true question is, whether the reservation of rent be provided for by the covenant contained in this lease in the way most beneficial to the whole inheritance, and all the persons who may be thereafter interested. In pursuing that inquiry, and indeed in the whole administration of the law, nothing is more important than to consider what has always been the approved practice in such cases, and what rules that practice has introduced; for to those it must always be the safest course to adhere.

If once we depart from that course, it must be taken into consideration, that no tenant for life, nor trustee, can or will hereafter act in the execution of a power without the previous sanction of a Court, which can only be obtained through the dilatory and expensive medium of a litigated suit. I shall only observe, in conclusion, as Mr. Justice *Bayley* has put this question—There is a power of re-entry for non-payment of the rent contained in this lease, and there is a great variety of such powers as is acknowledged in the books. It is a reasonable power, having the usual legal conditions: and if on the one hand, it be said, that those conditions are not expressly required by the leasing power given by the settlement, it may be answered on the other, that they are such

as there is nothing to be found there which condemns them. We have, moreover, the authority of the legislature for holding them to be reasonable, at least; and therefore I say that the lease in question appears to me to be a good execution of the power, and if so, it should be pronounced to be valid.

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That is the opinion which it is my duty to submit to your Lordships; but it is not for me to anticipate whether your Lordships may think proper to adopt it or not: it is sufficient for me to express it.

Lord REDESDALE.—I shall not trouble your Lordships at any length upon the question now before you; but having attended throughout the discussion of it, and having in the earlier part of my life had much intercourse with persons eminent in the practice of conveyancing, which furnished me with opportunities of information on cases of this description, I shall therefore offer such reasons as occur to me for holding the opinion I have formed, and which I think it my duty to submit to your Lordships' consideration.

On the subject of the practice of conveyancers having great weight in determining points of this nature, so high has the authority of ancient and uniform practice ever been considered, that even the construction of an Act of Parliament has been adopted from, and founded on the practice of lawyers conversant with the principle of common assurances. And that principle was sanctioned and adopted by this House, in a question on the Statute of Jointure, in the case of *The Earl of Buckinghamshire v. Drury* (a), and it was there determined, that a rent-charge settled on an infant, was within the Statute of Jointure (b), a good bar of dower, not because it was the literal interpretation of the statute, but because such had been the constant practice of

(a) 2 Eden's Rep. temp. Lord Northington, 60. S. C. 3 Bro. Parl. Cas. 492.—(b) 27 Hen. 8. c. 10.

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conveyancers and others, touching that particular subject. If your Lordships should decide that regard is not to be had to long established forms and practice in considering questions of this nature, by such a decision every man's title to his property would be endangered. But more especially, is it necessary, that the established practice should be adverted to in aid of the construction of instruments of this description, framed from precedents constantly acted upon, and not disputed in Courts of Law, and ordinarily prepared by those persons who employ their minds in the construction of deeds. How else are we to understand such instruments, if not by giving technical effect to the words employed by the parties to them, which are, in truth, the words of the professional persons who advise them, and are used as being best calculated to carry into execution the intentions of the party who instructs them, and who are of course informed of their meaning and legal import? Therefore it is, that I conceive we are to be bound by the practice of conveyancers, which, on subjects of this description, is so important, as to be tantamount to a practical and true exposition of the law as it affects such subjects, and more particularly so, if such practice has prevailed for a great length of time, without impeachment in a Court of justice. Most mischievous and dangerous would be the consequences if it were not so, and if titles should be made to depend on verbal criticism, and be impeachable by means of the literal construction of the instruments which create them.

If that be so, the facts of this case, and the very words of the power and of the proviso, must decide this question, when applied, as they ought, in all cases to be, to the subject-matter.

The power in question is one of three powers, relating to three distinct descriptions of property, and varying according to those descriptions. First, of property which was under the settlement, let under leases for life or lives, or for years determinable upon life or lives;—secondly, of pro-

perty that consisted of lands not under such leases, but under rack-rent leases;—and thirdly, of mines.

Those distinctions must convince us that the person who framed this settlement, contemplated the different circumstances in which these three descriptions of property then stood, and that she meant to give by the several powers the same degree of enjoyment of each as had been given by the former owners of the property, which, as to that which is the subject-matter of the present question, was, that the tenant for life should have the advantage arising from renewals of the existing leases from time to time, as the lives should drop during his possession. She has required only that he should reserve as great or beneficial rents, &c. or more (and not less) than had been reserved in the former leases; and not only the rents, but every other service was to be reserved exactly in the same manner as in those leases. The power to lease the second description of property, requires the best and most improved rents to be reserved, and then are added the words, “that can be *reasonably* had or obtained for the same.” If that word “*reasonably*,” which is introduced there merely out of caution, had not been added, would it not have been implied? And if that word had been absent, and a lease had been made, reserving in reasonable estimation, the most improved rent that could fairly, honestly, and reasonably be obtained, without fine or premium, would not that have been a good lease, and a sufficient execution of the power? The introduction of that word, therefore, does not in any respect alter the terms of the power; for it must have been so construed without it.—Of the two powers to lease for lives, or years determinable on lives, and for short terms at a rack-rent, one requires the power of re-entry to be reserved in one way, the other in another; and I think that was designedly so varied. With respect to the latter, the power of re-entry is to be given for non-payment of the rent within twenty-eight days after it has become due, pointing out the time in precise words. Why,

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then; were not precise words used in the other power? For this obvious and manifest reason:—because the first power referred to the mode of executing the power which had been observed in the prior and existing leases; and it was intended, that whatever the mode might have been, it should still continue to be followed;—or if there should be found to be no such power of re-entry for non-payment of the rent reserved there, then that some such power was to be inserted in the new leases. It is a mistake to say, that the words of the power in the deed are precise and specific in their directions. That is the fallacy on which most of the reasoning has been founded, to shew that this lease is invalid. The words are not precise—they are vague and loose, amounting to nothing more than a mere note or memorandum, importing, that in case there should be no power of re-entry for non-payment of the rent inserted in the former leases, such a power should be introduced in the new leases, which were in all other respects to be conformable to the old ones. In the former leases, there was a power of re-entry reserved, not only for non-payment of the rent, but for the non-performance of the other services, such as the render of capons, and doing suit at mill, &c. to all of which the power extended. The power in the settlement, therefore, being quite general, without giving any definite directions as to the mode of executing it, being in short, merely in the nature of a memorandum, if I may so call it, that the leases should contain a power of re-entry, the maker of this lease has put the natural construction upon the words; and the construction which has been attempted to be put upon them in support of these objections, is a forced construction, and an attempt to render them more precise and strict than they really are. Now, let us suppose, that a contract had been entered into between the parties to this lease, for a lease of the property in question, and it had been agreed that it should contain a power of re-entry for non-payment of the rent to be reserved.—If in a suit for a spe-

the performance of that contract, a Court of Equity should decree it to be specifically performed, would that Court ever have thought, that under the terms of this clause in the settlement, they were bound to direct a clause to be inserted in the lease, giving an absolute power of re-entry on non-payment of the rent, unqualified by the ordinary provisions of a few days extension of the time, and the absence of a sufficient distress? Would not the words be construed according to the common and ordinary practices, which must have been borne in mind by the conveyancer who prepared the settlement, when he inserted this general clause for reserving the power of re-entry? The professional character and habits of the person who framed the deed, must be regarded, and the technical acceptance of the clause, according to the common notions of such person must be resorted to, in order to ascertain the intention of the parties to the instrument, who are made to express themselves in his more accurate language. Having, then, recourse to such means of construction, we must see that this clause was no more than a mere minute or memorandum, the terms of which were to be supplied more definitely in the lease, as it must have been, if it had been made one of the terms of a contract for a lease entered into between these two parties. I consider, therefore, that it must be taken to have been the intention of the parties to the instrument, that the terms of this clause should be advisedly not precise, thereby designedly leaving it to be interpreted by the clause to that effect in the former leases, if they contained such a clause, but if they did not, that a reasonable power of re-entry should be inserted in the future leases. If there were a power of re-entry reserved in the former leases, no especial directions as to the insertion of such a power in the new leases would be necessary, because the rent being required to be reserved in "*as beneficial*" a manner, it must have been reserved in the same words, and in none other. Now, as all the doubt in this case has been founded upon

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JOHNSON v. COOPER.

If a defendant be arrested by the name of *Josiah*, instead of *Josias*, the Court will discharge him out of the custody of the sheriff, on his entering a common appearance, and undertaking to bring no action against the plaintiff or sheriff.

MR. Serjt. *Onslow*, on a former day in this Term, had obtained a rule nisi, that the defendant might be discharged out of the custody of the sheriff of *Hertford*, on entering a common appearance, on an affidavit which stated, that he was described in the *capias* under which he was arrested, as *Josiah*, and that he was baptized by the name of *Josias*, and had always been known by that name. He referred to the cases of *Smith v. Innes* (a), and *Wilkes v. Lorck* (b), where similar applications had been granted.

Mr. Serjt. *Vaughan* now shewed cause; and on his consenting that the defendant should bring no action either against the plaintiff or the sheriff, the Court made the rule

Absolute (c).

(a) 4 Maul. &amp; Selw. 360. — (b) 2 Taunt. 399.

(c) In *Kitching v. Alder*\*, where a defendant had been arrested by a wrong name, and given a bail bond, and moved to set aside the writ and proceedings, the Court of King's Bench required him to file common bail, and undertake not to bring any action.

\* 1 Chit. Rep. 282.

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WILLIAMS v. TAYLOR.

A continuance of notice of bail, where time was not given by the Court, need not be served before three o'clock, as specified in the rule, *Michaelmas* Term, 60 Geo. 3.

By the rule, *Michaelmas* Term, 60 Geo. 3. every notice for justifying bail in person, must be served before eleven o'clock in the forenoon of the day in which such notice ought to be served; except where an order of the Court for further time has been obtained, in which case it is sufficient to serve the notice before three o'clock in the afternoon of the day in which such order should be granted.

Held, by Mr. Justice RICHARDSON (the only Judge in Court), that a continuance of notice of bail, although time was not given by the Court, need not be served before three o'clock, as being within the spirit, though perhaps not within the letter of the rule.

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WILLIAMS  
v.  
TAYLOR

## BASSETT v. OSBORNE.

Monday,  
May 21.

THIS was an issue directed by the Vice Chancellor, on the 18th December, 1819, to try whether a second mortgage made by the plaintiff, was usurious or not, and it was further ordered, that the parties should proceed to trial at the Sitings after *Hilary* Term, 1820.

A defendant may carry the record of an issue directed by the Vice Chancellor down to trial, on the ground that the plaintiff endeavoured to delay it.

Mr. Serjt. *Lens*, on a former day in this Term, had obtained a rule *nisi*, that the defendant might be at liberty to carry the record down to trial at the next Assizes, on an affidavit which stated, that he was desirous of trying the question, but that the plaintiff endeavoured to delay it; and he relied on the case of *Humpage v. Rowley* (a), as being precisely in point.

Mr. Serjt. *Vaughan* was now about to shew cause: but the Court observed, that the plaintiff would not be damned by this application, and that in *Humpage v. Rowley*, it was deemed so reasonable, that the rule was made absolute in the first instance.

Rule absolute.

Mr. Serjt. *Vaughan* then submitted, that as the order had been made so long since, it had in effect expired, and

(a) 4 Term Rep. 767.

1821.

Saturday,  
May 19.

If a defendant be arrested by the name of *Josiah*, instead of *Josias*, the Court will discharge him out of the custody of the sheriff, on his entering a common appearance, and undertaking to bring no action against the plaintiff or sheriff.

Mr. Serjt. tained a rule out of the Court a comm

he was as

*Next Demandant*; MEREDITH, Tenant; EDWARDS, Vouchee.

*Mr. Serjt. Bosanquet* moved, that this recovery might be amended, by inserting the words "fee-farm rent;"—on an affidavit which stated, that the vouchee was tenant in tail of such rent;—that the deed to make a tenant to the *precipe*, was sufficiently comprehensive to include it, as it conveyed all the freehold manors, messuages, tenements, and hereditaments of the vouchee, in the counties of *Bedford* and *Buckingham*, in the latter of which the rent issued;—that the manors were mentioned in the recovery, and the fee-farm rent was intended to be included, and that the parties were all alive. He referred to the case of *Brett*, demandant; *Smith*, tenant; *Honeywood*, vouchee (a); where a recovery was amended by inserting a rent-charge, which had long been treated as merged in the land by unity of possession.

*Fiat.*

1821.

ADAM v. DUNCALFE.

Monday,  
May 21.

THIS was an action of replevin. The declaration alleged that the defendant on the 17th *January*, 1818, at *Wellington*, in the county of *Salop*, upon certain lands there, took the goods of the plaintiff, and unjustly detained them, &c.

In an avowry founded on a distress for rent, the defendant averred, that the plaintiff held certain strata or veins of iron-stone, under a lease, which contained a proviso, that "if the stone should not be wholly gotten or wrought out within the term of eight years, from the commencement of the demise, the rent in respect of such as should then remain ungotten, should be paid to the lessor." On the production of the lease, the proviso contained the additional words "if the same should be found to be gettable :"—Held, that this was a fatal variance, and that the plaintiff was entitled to recover on *non est factum*; and it seems, that he would only be liable

Avowry, that one *John Pearse*, in his life-time, to wit, on the 1st *May*, 1809, was seised of the places in which, &c. in fee, and being so seised, he, by a certain indenture, bearing date on that day, and made between himself of the one part, and the plaintiff of the other, demised to the latter certain closes and cottages at *Wellington* aforesaid; and also all those strata, beds, seams, or veins of coal and iron-stone called the fungus coal, and the iron-stone called the brick-measure stone, that might, within the term by the said indenture limited, be procured, extracted, produced, discovered and found under the said closes, for the term of fourteen years, commencing from the 25th *March* then last past, and fully to be complete and ended;—the plaintiff paying certain rent for the same, as therein mentioned :—And that it was by the said indenture provided, that if the brick-measure stone should not be wholly gotten or wrought out within the term of eight years from the commencement of the said demise, the rent in respect of such brick-measure stone, amongst other species of iron stone, in the said indenture mentioned, as should then remain ungotten, should be paid to *Pearse*, his heirs and assigns, by the plaintiff, at the expiration of such eighth year of the said term; the amount of such rent, or sum of money, to be fixed and ascertained according to the quantity in measure

to pay for such stone as could be gotten, and not for that which was not gettable.

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 ADAM
 v.
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of the surface of the land under which the said last-mentioned iron-stone, or any part thereof, should so remain ungotten; it being calculated that each superficial square yard of the said iron-stone, would together produce ten hundred weight, when raised, according to which estimate, the said rent should be fixed and paid.—The avowry, then, after stating the entry of the plaintiff, and the devise of the reversion to the defendant, went on to allege, that at the expiration of the eighth year of the term, a certain large quantity of the said iron-stone, called brick-measure stone, to wit, the quantity of 27,075 superficial square yards of the same, containing, according to the above calculation, divers, to wit, 13,537 and a half ton weight, remained ungotten; and because a large sum of money, to wit, 789*l.* 13*s.* 9*d.* of the said rent for each and every ton weight of the said brick-measure stone, which so remained ungotten at the expiration of the said eighth year of the said term, to wit, on the 25th *March*, 1817, and from thence until, and at the said time when, &c. was due and in arrear from the plaintiff to the defendant, he well avowed the taking the plaintiff's goods, as a distress for the said sum of 789*l.* 13*s.* 9*d.*

The plaintiff pleaded in bar, first, *non est factum*; secondly, *non tenuit*; and thirdly, *riens in arrear*.

The cause came on for trial before Mr. Justice *Richardson*, at the Spring Assizes for the county of *Salop*, 1820, when the Jury, by consent, found a verdict for the defendant, assessing the rent at the said sum of 789*l.* 13*s.* 9*d.*, subject to the opinion of the Court upon the following case:—

On the 1st *May*, 1809, *Pearse* and the plaintiff executed the lease in question, which formed part of the case. The plaintiff immediately entered into, and has from thence

continued possessed of the demised premises. The defendant, in *June*, 1810, became devisee of the reversion; some part of the brick-measure stone, on the 25th *March*, 1817, remained, and still remains ungotten, of which a proportion is clearly not gettable; and as to the remainder, it is contended by the plaintiff, that it is not gettable, and by the defendant, that it is. No referees had been appointed prior to the distress, to ascertain the amount of the rent.

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The questions for the opinion of Court were, first, whether the plaintiff was bound to pay for the brick-measure stone ungotten, although it was not gettable; secondly, whether the payment in question could be distrained for; and thirdly, whether the plaintiff was liable to pay, as the defendant contends, for the brick-measure stone, according to all the superficial measure remaining ungotten on the 25th *March*, 1817, or only for such part as actually contained brick-measure stone, as the plaintiff contends.

If the Court should be of opinion with the plaintiff on the first question, and should likewise hold, that the defendant is not entitled to recover, if a part only of the brick-measure stone remaining be gettable, and the rest ungettable, a verdict was to be entered for the plaintiff. So, if they should be of opinion with the plaintiff on the second question, a verdict was to be entered for him.

The case now came on for argument, when

Mr. Serjt. *Lens* for the plaintiff, on referring to the lease, submitted, that there was a fatal variance between the proviso therein contained, and that set out in the avowry as to the getting of the brick-measure stone; as in the latter, it appears to be absolute and unconditional, viz. "that if it should not be wholly gotten or wrought out within the term of eight years from the time of the demise, the rent

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in respect of such stone as should then remain ungotten, should be paid by the plaintiff;—whereas, in the lease, it was added, “if the same should be found to be gettable,” which was altogether omitted in the avowry. By that qualification, the lessee was only liable to pay for such stone as should be found gettable, and eight years were allowed him to determine whether it was to be gotten or not. If that be so, the sum in question could not be distrained for, as it was not reduced to a certainty; or, at all events, the remedy, if any, was for a breach of covenant.

Mr. Serjt. *Hullock*, contra. The question is, not whether the plaintiff, as lessee of the lands in question, has made a provident bargain or not, but whether he has not bound himself by the proviso, to pay for the brick-measure stone remaining ungotten at the expiration of the eighth year of the term, whether it was capable of being gotten or not? He was aware at the time he entered into the covenant, that it might be all gotten within that period, unless he were prevented by accident, or some unforeseen cause; and, at all events, he must be liable for that part which is now gettable, and which might be determined by an arbitrator.

But the Court held, that the proviso in the lease was improperly set out in the avowry; and therefore, that the plaintiff was entitled to recover on the plea of *non est factum*; and they expressed a strong opinion, that he was only liable by the terms of the covenant, to pay for the stone which could be gotten, and not for that which was not gettable.

Judgment for the plaintiff.

1821.

JAMES T. JAMES and Others.

Wednesday,  
May 23.

**THIS** was an action of debt on bond, bearing date the 18th November, 1816, in the penal sum of 800*l*. By the condition it was recited, that the plaintiff was entitled to an interest in certain veins of coal, for her life; and that she by indentures of even date with the bond, had assigned such interest to the defendants, who, in consideration thereof, had agreed to pay her an annuity of 60*l*. *per annum*; and the bond was then conditioned for the payment of that annuity to the plaintiff for her life. The defendants having cravedoyer, pleaded that no memorial was enrolled according to the statute 53 Geo. 3. c. 141. s. 2. Replication, that the annuity was granted for the consideration in the condition mentioned, and not for money or money's worth, within the meaning of that statute, on which issue was joined.

A fair and *bona fide* sale of an interest in land, where the consideration in part or in whole, is an annuity to be paid to the vendor; the consideration for granting such annuity, is not a pecuniary consideration or money's worth, within the meaning of the statute 53 Geo. 3. c. 141. Where, therefore, the plaintiff had assigned an interest in coal veins to the defendants, in consideration of an annuity for her life, and for the payment of which, a bond was conditioned: Held, that such bond did not require enrolment, under that statute.

At the trial of the cause, before Mr. Baron Garrow, at the last assizes at Monmouth, on the bond being given in evidence, it was insisted for the defendants, that it ought to have been enrolled under that statute; but a verdict was taken for the plaintiff, with liberty for the defendants to move to set it aside and enter a nonsuit, if the Court should be of opinion that such enrolment was necessary.

Mr. Serjt. Pell on a former day in this Term, accordingly applied for a rule *nisi*, and submitted, that although the second section of the 53 Geo. 3. seemed to apply to pecuniary considerations alone, still, as by the tenth section it was enacted, that the act should not extend to any voluntary annuity or rent-charge, granted without regard to pecuniary consideration or money's worth, it must be taken to apply to all cases of annuities granted in consideration of money's worth; and, by the second section of that statute, it is declared, that every deed, bond, instrument, or other assurance,

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whereby any annuity shall be granted, shall be null and void, unless memorialized and enrolled in Chancery.

Cur. adv. vult.

Lord Chief Justice DALLAS, on this day, having stated the circumstances of the case as above, and observed, that the question would depend on the construction of the second and tenth sections of the statute 53 Geo. 3. c. 141. delivered the opinion of the Court, as follows:—

The second section of that statute, requires every memorial of an annuity enrolled in pursuance of the act, to specify, among other things, “the pecuniary consideration or considerations for granting the same,” which words necessarily presuppose and require the existence of a pecuniary consideration to be so specified, and shew that the statute does not apply to cases where no such consideration exists. The form of memorial also, given by the same section, in the column headed “consideration, and how paid,” specifies pecuniary considerations only, whether paid in money or in bank notes, or other notes, or bills of exchange, as the case may be. The tenth section declares, (amongst other things) that the act shall not extend “to any voluntary annuity or rent-charge, granted without regard to pecuniary consideration or money’s worth;” and from these words it has been argued, that the act applies to all cases, where any thing valuable is given for the purchase of an annuity. It is true, that these words import, that “money’s worth” may, in certain cases, be a “pecuniary consideration,” within the meaning of the act; as where the grantee pays for the annuity, in part or in whole, by goods or merchandize, with a nominal, or perhaps a real value imposed upon them, to be converted into money by the grantor; and where the object of the grantor was to raise money, and where such appears to be the real nature of the transaction, however it may be disguised. But considering the second and tenth sections together, and the intent of the legislature, as it is to be collected therefrom, the Court is of opinion, that the act

does not extend to cases of fair and *bonâ fide* sales of landed property, whether freehold, for life, or leasehold for a term of years, where the consideration in part or in whole, may be an annuity to be paid to the vendor. In such cases, the consideration for granting the annuity being an estate in land *bonâ fide* sold or conveyed, does not seem to us to be a pecuniary consideration or money's worth, within the meaning of the statute. Such appears to be the nature of the present case, and therefore my Brother *Pell* will take nothing by his motion.

Rule refused.

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JAMES
v.
JAMES.

HARRISON v. SMITHERINGALE.

Wednesday,
May 23.

THIS was an action brought by the plaintiff, to recover the sum of 25*l.* being half a year's rent, due to him from the defendant, for a post wind-mill. See the marginal note to the last case.

At the trial of the cause before Mr. Justice *Richardson*, at the last assizes at *Lincoln*, the plaintiff having established the tenancy by the defendant, the latter gave in evidence, indentures of lease and release, of the 8th *July*, 1819, by which the plaintiff conveyed his interest in the mill, in trust, to one *Sharp*, for the consideration of the payment of an annuity of 80*l. per annum* to the plaintiff for life. On the production of the deeds, it appeared, that they had not been enrolled, when it was contended for the plaintiff, that they were void, as it was necessary that they should have been memorialized, under the statute 53 *Geo. 3. c. 141.* The learned Judge, however, was of opinion, that an enrolment was unnecessary, as the consideration for granting the annuity was a conveyance of an interest in land, and therefore not a pecuniary consideration, within the meaning of the statute; and the Jury accordingly found a verdict for the defendant.

Mr. Serjt. *Blosset*, on a former day in this Term, had applied for a rule *nisi*, that this verdict might be set aside,

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and a new trial granted, on an affidavit of the plaintiff, which stated, that he was taken by surprise at the trial, by the production of the deeds; and that he would otherwise have been prepared to prove that he had merely a chattel interest in the mill; and that he had not conveyed it in fee, as appeared by those instruments.

The learned Serjeant now submitted, that at all events, the deeds ought to have been enrolled, as the 53 Geo. 3. made no exception as to the consideration for which an annuity was granted; but applied to every case, where any thing valuable was given for the purchase thereof.

The Court ordered the rule to be suspended, until they had considered the foregoing case of *James v. James*; and Lord Chief Justice *Dallas* having given judgment in that case, now said, that the same observations applied to this; and the rule was consequently

Refused.

Friday,  
 May 25.

APLIN v. FOX.

If the justification of bail by affidavit be opposed by another affidavit, stating the insolvency of one of the bail, the Court will not allow the matters of the latter affidavit to be answered.

MR. Serjt. *Peake* opposed the justification of bail in this case, by affidavit; on an affidavit which stated, that one of them had acknowledged that he was in insolvent circumstances, and unable to pay his debts; and that the defendant's attorney had assured him, that his becoming bail was a mere matter of course, and that, if any thing happened, his co-bail alone would be responsible.

Mr. Serjt. *Vaughan* insisted, that he was entitled to answer the matters contained in that affidavit by another: But the Court were decidedly of opinion that he was not; and the bail were consequently

Rejected.

1821.

## MABERLEY v. BENTON.

Friday.  
May 25.

MR. Serjt. *Hullock*, on a former day in this Term, had obtained a rule *nisi*, that an *exoneretur* might be entered on the bail-piece in this cause, on the ground of a variance between the writ and declaration. The *ac etiam* being "in a plea of trespass on the case upon promises," and the declaration having been delivered in debt.

Where the *ac etiam* in a writ was "in a plea of trespass on the case upon promises," and the declaration was delivered in debt; it is a fatal variance, and the Court ordered an *exoneretur* to be entered on the bail-piece, and would not allow the declaration to be amended by filing it in *assumpsit*.

Mr. Serjt. *Cross* now shewed cause, and submitted, that although the case of *Kerr v. Sheriff* (a), was in terms, similar to the present, still, that there the application was merely to cancel the bail bond, whilst here, the defendant has appeared and perfected his bail;—at all events, it was an application to the equitable jurisdiction of the Court.

But, *per Curiam*.—The bail are clearly discharged, as they only engaged to become liable in an action of *assumpsit*; and the plaintiff by declaring in debt, has not pursued the same species of action. In *Tetherington v. Golding* (b), it was decided to be irregular to hold a defendant to bail in *assumpsit*, and then to declare in trover; and the case of *De La Cour v. Reed* (c), proceeded on the same principle.

Rule absolute.

Mr. Serjt. *Cross* then applied to amend the declaration, by allowing it to be filed in *assumpsit*, instead of debt.

But the Court observed, that the original application was made on behalf of the bail, who were discharged by the irregularity.

The learned Serjeant, therefore, took nothing by his motion.

(a) 3 Bos. &amp; Pul. 358.——(b) 7 Term Rep. 80.

(c) 3 H. Bla. 278.

1821.

Saturday,  
May 26.WILLIAM WINSOR, SUSANNAH WINSOR, JANE  
BOUCHER, and THOMAZINE JAMES, v. PRATT  
and others.


Where a will, **THIS** was an action of detinue, to recover the title-deeds of  
which was divers real estates at *Bromley*, in the county of *Middlesex*,  
written on and elsewhere, of which one *Charles Reeks*, attorney and  
three sides of one sheet of paper, and duly attested by three wit-  
nesses, con- notary, died seised. The declaration set forth the particular  
cluded by sta- deeds. Plea, Not Guilty.

The cause came on for trial before Lord Chief Justice  
Dallas, at *Westminster*, at the Sittings after *Easter Term*,  
1820, when a verdict was found for the plaintiffs, subject to  
the opinion of the Court on a case, of which the following  
is the substance :—*Charles Reeks* being seised in fee of  
the premises in question, on the 17th *July*, 1812, made his  
will in the presence of, and attested by three witnesses,  
whose names were subscribed thereto, by which he devised  
the rents, issues, and profits of three freehold estates, situate  
at *Limehouse*, *Bromley*, and *Stepney*, to his wife for life,  
and, on her decease, to *Mary Burford*, the mother of his  
wife, for her life, and on the decease of his wife and her  
been the testa-  
tor's former intention, it was abandoned by the final signature made by him at  
the time of executing the will.—So, where the testator had executed such will,  
by which he devised certain real estates to his wife for life, and on her death,  
to *I. S.*, and on the death of both, to his executors in fee, upon certain trusts,  
and some years afterwards he made various interlineations and obliterations  
therein, confining the first devise made to his wife to her widowhood, and striking  
out the devise to *I. S.*, and obliterating the original date, and substituting  
the day of *November*, instead thereof, and the will was never re-signed,  
re-published, nor re-attested, but a fair copy was afterwards prepared, and the  
testator added one interlineation therein, not affecting his real estate, but which  
copy was never signed, published, or attested, and the will, thus altered, and  
fair copy, were found locked in a drawer together, at the residence of the  
testator after his death: Held, that there was no revocation of the will as it  
originally stood, as the alterations and obliterations were merely demonstrative  
of a future intent of the testator to execute another will, which was never  
carried into effect.

mother, he devised the estates at *Bromley* and *Limehouse* to his executors thereafter-named, upon trust, to sell and dispose of the same, and divide the net produce thereof equally between his three sisters, *Jane Boucher*, *Susannah Winsor*, and *Thomazine James*, or to the issue of such of them as might happen to die before the same should be receivable. He also bequeathed certain leasehold houses and ground rents to his wife absolutely, as well as such of his household furniture as she might think proper to take. He further devised certain lots of freehold ground to his wife in fee; and after bequeathing to his said three sisters a legacy of 100*l.* each, he gave and bequeathed his residuary estates to his executors (the defendants) in trust, to sell and divide the same in four equal parts, the produce of which, after paying all his debts, was to be paid to his wife and the said three sisters, share and share alike. The will then concluded with the following passage:—"In witness whereof, I (the testator) have signed my name to the two first sides hereof, and my hand and seal to this last side, declaring this to be my last will and testament, this 17th *July*, 1812." The testator put his name and seal at the end of the will, but omitted to sign his name to the first two sides thereof, it being written on three sides of one sheet of paper. In *November*, 1816, he made various interlineations and obliterations in the will, in his own hand writing, by limiting the life estate of the wife in the three freehold estates first devised, to her widowhood, by an interlineation, and he struck out with a pen the devise to her mother for life, and as to the trust estate, he directed the produce of the sale of the estates to be laid out in the public funds in the names of the executors. The original date at the bottom of the will (*viz.* the 17th *July*, 1812) was struck out, and the day of *November*, 1816, substituted. This will, so interlined and altered, was never re-signed, re-published, or re-attested; but in the month of *December*, 1816, the testator caused a fair copy of it to

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be made, and afterwards inserted one interlineation therein as to the disposal of a leasehold house, then in his occupation, at *Stratford*. This fair copy was never signed, published, or attested; and on the 24th *December*, 1816, the testator died, leaving his wife surviving, and without issue. The plaintiffs, *Jane Boucher*, *Susannah Winsor*, and *Thomazine James*, are the sisters and co-heiresses-at-law of the testator, and the plaintiff *William Winsor* is the husband of *Susannah*, and as such, claimed to be entitled to the real estates of which the testator died seised, subject to his widow's claim of dower. On the other hand, the widow claimed to be entitled to the whole of such estates as devised for life under the will. The will and fair copy were found together, amongst other important papers, locked up in a drawer at the testator's residence, the day after his death, in the state as before described. The defendants, after the death, (*viz.* on the 7th *January*, 1817) as the executors named in the will of the 17th *July*, 1812, exhibited it, with the interlineations and obliterations as above set forth, in the Prerogative Court of the Archbishop of *Canterbury*, and obtained probate thereof. They also possessed themselves of all the title deeds of the real estates belonging to the testator. The personal estate was more than sufficient for the payment of the debts of the testator, as well as the legacies given by his will. The plaintiffs, previously to the commencement of this action, duly demanded the title deeds in question from the defendants, who refused to deliver them up.

The question for the opinion of the Court was, whether, under these circumstances, the plaintiffs were entitled to recover, and to what extent, or in respect of which of the real estates of the testator mentioned in the said will. If they should be of opinion that the plaintiffs were entitled, the verdict was to stand with nominal damages, the defendants

undertaking by rule of Court to deliver up all and every the title deeds to the plaintiffs, to which they might be entitled; but if the Court should be of opinion that the plaintiffs were not entitled to recover, then, a nonsuit was to be entered.

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The case for the plaintiffs was argued on a former day in this Term, by

Mr. Serjt. *Pell*, who submitted, *first*, that the original will, even if it had remained unaltered by the testator, was not well executed, according to the meaning of the statute of Frauds<sup>(a)</sup>. *Secondly*, that the alterations, obliterations, and interlineations therein, amounted to a revocation, and avoided it altogether. *First*, the will was not properly signed or executed by the testator, as he intended to put his name at the bottom of each side of the sheet of paper, whereas, he signed it at the end of the will only. Although the omission might have been by mistake, and there was not the same opportunity for fraud as if it had been written on three separate sheets, still, it was not duly executed by him, or as he proposed. In *Right, d. Cater v. Price* <sup>(b)</sup>, where the will was prepared on five sheets, and a seal affixed to the last, and the form of attestation was written upon it, and the will was read over to the testator in the presence of three witnesses, who afterwards subscribed their names to it, and he set his mark to the two first sheets in their presence, and attempted to set it to the third, but being unable, from the weakness of his hand, he said "he could not do it, but that it was his will:" and on the following day, being asked if he

(a) 29 Car. 2. c. 3. s. 5. By which it is enacted, that "all devises of land must be in writing, and signed by the devisor, or by some other person in his presence, and by his express directions, and shall be attested and subscribed in the presence of the said devisor by three or four credible witnesses."

(b) 1 Doug. 241.

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would sign his will, he said "he would," and again attempted to sign the remaining two sheets, but was not able: the Court seemed to be of opinion, that this was not a sufficient signing—for the testator, when he signed the two first sheets, had an intention of signing the others, and consequently there was never a signature of the whole. There too, the testator was incapacitated from signing the whole by illness; but here, no reason is assigned why the signature was not put at the bottom of the two first sides of the paper, as the testator expressed that he intended to have done so.

[But the Court observed, that at present it appeared to them, that the testator, by putting his name at the end of the will, had adopted the whole of it, as it was written on one sheet of paper only—that this circumstance made the present case distinguishable from that of *Right, d. Cater v. Price*, where the will was written on five separate sheets. Besides, here, the testator expressed that "he had signed;" whereas, there, he observed "he would" but was prevented by illness. If, in this case, he had stated that he had signed it in the presence of five persons, and three only had subscribed it, it would have been a good execution within the statute. They therefore requested the learned Serjeant to direct his argument to the second point,—as to whether the subsequent alterations amounted to a revocation or not.]

Although the cases of *Sutton v. Sutton (a)*, *Larkins v. Larkins (b)*, and *Short, d. Gastrell v. Smith (c)*, have established that an erasure of part of a will does not necessarily operate as a revocation of the whole, but merely *pro tanto*, still, there is a great difference in the effect of an alteration and mere erasure, since, the former, if it consists in making any new gift or disposition, is, to that extent, another devise,

(a) Cowp. 812.—(b) 3 Bos. & Pul. 16.—(c) 4 East, 419.

and will require the will to be re-executed according to the statute. Here, by the original will, certain freehold estates were devised to the testator's wife for life, and by the interlineation it was narrowed to her widowhood; and the devise to her mother was altogether obliterated. Besides, a different enjoyment was given to the trustees, as they would be entitled to take the estate sooner than they otherwise would have done, if the will had remained in the state in which it was originally made. But the alteration in the date is the most material circumstance to be attended to. The original date of the 17th *July*, 1812, was altogether obliterated in the will as altered, and no particular day was substituted in lieu thereof. It does not appear, therefore, when the alteration was made, nor was the will, as altered, ever re-executed, so as to satisfy the statute of Frauds. It could not have been duly executed in 1812, because the testator had since signified his intention that it should not be considered a will as of that date, as it was altogether obliterated, and the month of *November*, 1816, substituted by him. In point of fact, therefore, it bore no date whatever, and it is stated in the case, that there was no re-publication of the will after it had been altered. This, therefore, distinguishes the present, from those cases where obliterations have been made, so as that the will should not be considered as revoked by a mere alteration or erasure, beyond the particular object of such alteration or erasure. Although in *Onions v. Tyrer* (a), which turned on the act of cancelling being under a mistake, and the intention of the testator was not to revoke his first will by cancelling, but by substituting another perfect will in lieu thereof; still, it was there held, that where the supposed revocation was by a written instrument, it could not make any difference whether the writing was on the same will or on another piece of paper, but that, in either case, it must be properly executed in order to work a revocation, according to the express enactment of the statute of Frauds.

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(a) 1 Peere Wms. 343.

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Here, therefore, the original will was not duly executed on the 17th *July*, 1812, as required by the fifth section of that statute; and the obliteration of that date, and the substitution of another, which was in itself imperfect, and which appears to have been made some time in *November*, 1816, can have no effect, as there was never any re-publication, but in fact, a revocation, by cancelling and obliterating the same, within the sixth section of that statute (a).

Mr. Serjt. *Lawes*, for the defendants.—The original will, as signed by the testator, was well executed within the meaning of the fifth section of the statute of *Frauds*, and the case of *Right, d. Cater v. Price (b)*, is altogether distinguishable from the present, as there the testator was in a complete state of insensibility when the will was attested. Taking it, therefore, that the original will in this case was well executed, the only question is, whether it was revoked by the subsequent alterations and obliterations made therein by the testator. In order to effect a revocation of a will by cancelling, it is in itself an equivocal act, and it must be shewn *quo animo* it was cancelled, for unless that appear, it will not amount to a revocation. If a will be cancelled by accident, it would not amount to a revocation; as if ink be thrown on it instead of sand, or if a testator, designing to cancel his former will, were accidentally to cancel one subsequently made, and meant to be his last will. But in *Doe, d. Perks*

(a) By which it is enacted, "that no devise in writing of lands, shall be revocable, otherwise than by some other will or codicil in writing, or other writing declaring the same, or by burning, cancelling, tearing, or obliterating the same by the testator himself, or in his presence, and by his directions and consent; but that all devises of lands shall remain and continue in force until the same be burnt, cancelled, torn, or obliterated by the testator, or by his directions, in manner aforesaid, or unless the same be altered by some other will or codicil in writing, or other writing of the deviser, signed in the presence of three or four witnesses, declaring the same."

(b) 1 Doug. 241.

*v. Perkes (a)*, it was held, that unless the act of cancellation be complete, as if a testator did not finish all that he intended for the purpose of destroying his will, it did not amount to a revocation. A mere intention to revoke, therefore, not carried completely into effect, does not amount to a revocation of a will previously made. Here, it is quite clear that the testator intended to do something more than he actually has done;—he was a professional man, and well knew the effect of a revocation; but it appears, that after he had made the alterations in his original will, he ordered a fair copy of it to be prepared, to which he added one other immaterial interlineation, and he allowed the seal, signature, and attestation of the former will to remain untouched and unaltered, and locked it up in his drawer, together with the fair copy—that, therefore, clearly shews, that he merely intended that another will should be executed, differing from the first as expressed by him, but which was not carried into effect, and therefore the original remained unrevoked and uncancelled. The principal objection which has been relied on for the plaintiffs is, as to the obliteration of the date as it stood in the original will; and it has been said, that none has been substituted in lieu thereof; but the mere obliteration of the date does not of itself affect the devises contained therein, nor is it essential as to the validity of a will—it only affords evidence of the time when it was made; but it is equally operative if it has no date at all. In *Swinburne on Wills (b)* it is laid down, that “when the whole of a will is not cancelled or defaced, but some part thereof only rased, blotted, or put out, it does not avoid it; for the other parts of the will do remain firm and safe as they were before, although the deletion were in the chief part of it, namely, the assignation of the executor.”

Here, however, the alterations in the original will do not

(a) 3 Barn. & Ald. 489. — (b) Part 7. s. 16. 3d case, page 538, 6th edit.

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even amount to a revocation *pro tanto* ; for they merely point out the intention of the testator of something more to be done in future : *viz.* either of re-executing that will, or of making another, neither of which was ever carried into effect. It has been further contended, that by limiting the estate of the testator's wife to her widowhood, and striking out the devise to her mother, it has materially altered the nature of the devise, as it tends to accelerate the enjoyment of the estate by the trustees ; but the devise to them is equally valid, although they might take at an earlier period than was at first intended by the testator ; for the devise to the wife was still good, so as to entitle the defendants to detain the deeds in question, for the purpose of providing for her interest.

The cases of *Sutton v. Sutton*, *Larkins v. Larkins*, and *Short, d. Gastrell v. Smith*, shew, that obliterations and erasures only operate as a revocation *pro tanto*, and that interlineations are altogether inoperative without a re-publication.

Those cases were determined on the sixth section of the statute of Frauds—the object of which was, that where a testator had expressed a clear intention by writing, such intent should not be superseded by any thing but a clear act of his own, manifesting a direct intention to revoke, and a revocation affected by an erasure or alteration, can extend no further than it appears to be the intention of the testator that it should operate. In *Sutton v. Sutton*, where lands were devised to trustees to sell for certain purposes, except a certain house, which the testator gave to his wife for life, and after her death to his eldest son, and after the execution of the will, he sold the house, and struck out the exception and devise respecting it, yet, the devise to the trustees was held not to be revoked.

That case, therefore, shews, that in the present instance, the testator's confining the first devise to his wife during her widowhood, would not affect that made to the trustees. So'

in *Larkins v. Larkins*, where a testator, after the execution of his will, struck out the name of one of the devisees, and there was no re-publication, it was determined that the will was not revoked beyond the particular object of such erasure, which merely operated as a revocation *pro tanto*. And in *Short, d. Gastrell v. Smith*, where there was an erasure of the name of one of the trustees, accompanied with the additional fact of two others having been substituted in his stead, and the will was not afterwards re-published, the Court held, that the intent of the testator appearing to be only to revoke by the substitution of another good devise to other trustees, as such new devise could not take effect under the statute, for want of the due execution of such altered will, it should not operate as a revocation, or, at most, it could only operate as a revocation *pro tanto* as to the trustee whose name was obliterated. So, here, the will in its altered state not having been re-executed, was equally inoperative, or, at most, could only operate as a revocation *pro tanto*. As well, therefore, on the facts of this case, as on principle and authority, the alterations, if not altogether immaterial, do not, at all events, amount to a revocation of the will.

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Mr. Serjt. *Pell*, in reply.—The class of cases which have been decided on the sixth section of the statute of Frauds are wholly dissimilar from the present; for here, the alterations made by the testator affect the whole subject-matter of his will. Whether the devise of the freehold estates was to his wife for life or *durante viduitate*, still, the plaintiffs, as heirs-at-law, are entitled to the title deeds in question, subject to her dower. No authorities have been cited, nor position stated, to shew that the original will was well executed, according to the fifth section of the statute of Frauds. It is quite clear it was not; for Lord *Mansfield*, in the case of *Right, d. Cater v. Price* said (a), that “the testator,

(a) 1 Dong. 243.



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when he signed the two first sheets, had an intention of signing the others, but was not able; he therefore did not mean the signature of the two first as the signature of the whole will—there never was a signature as of the whole.” That *dictum* is particularly applicable to the present case as to the first objection, with respect to the want of proper execution.

The main question, however, is, whether the obliterations and alterations afterwards made in the will do not amount to a revocation, as to the interests the defendants may derive under it? As to whether it amounted to a cancellation by accident, is entirely out of the question; and in *Doe, d. Perkes v. Perkes*, it was merely determined, that it was properly left to the Jury to say, whether, under the circumstances of that case, the testator had completely finished all that he intended to accomplish for the purpose of destroying his will. It has been said, that the intent of the testator must prevail; if so, it is quite clear that he meant that another will should be substituted for the former, and such act need not be done according to technical or prescribed forms. Here, however, not only is the interest of the testator’s wife limited, and the devise to her mother altogether obliterated, but the date of the will is entirely expunged and none substituted in its stead, which, if taken with reference to the other alterations, amount to a revocation, within the terms of “cancelling or obliterating the will by the testator himself” contained in the sixth section of the statute of Frauds.

Lord Chief Justice DALLAS.—As the facts of this case have been so fully before the Court, it is unnecessary for me to recapitulate them; and two questions have been raised, first, whether the will of the 17th *July*, 1812, was duly executed; and, secondly, supposing it to have been so, whether it has been since cancelled or revoked by the alterations made in it by the testator? On the first point, it has been contended, that the will was not valid for want of a

sufficient execution, inasmuch as it was written on three sides of one sheet of paper, and the testator at the end of the will stated that he had signed his name to the two first sides thereof, and his hand and seal to the last, whereas he merely put his name and seal at the end of the will, but did not sign his name to the two first sides. In support of this objection, the case of *Right, d. Cater v. Price* has been relied on, and more particularly the language adopted by Lord *Mansfield* in delivering his judgment, viz. "that there were many particular circumstances in that case besides the general question. That the testator, when he signed the two first sheets, had an intention of signing the others, but was not able. He therefore did not mean the signature of the two first as the signature of the whole will. There never was a signature as of the whole."

I must own, as far as I understand that case and the principle on which it was decided, it appears to me to turn directly the other way, as it shews a prospective intention on the part of the testator to sign the other sheets of the will, and an incapacity to carry that intention into effect. There too, the will was prepared on five separate sheets of paper, and the testator had merely set his mark to the two first, but was incapacitated by weakness from signing the third. Here, however, the will was written on one sheet of paper only, and signed by the testator at the end, and the witnesses who attested it must have known whether he signed it at the time of its execution or not.

This case is further distinguishable, as there the last sheet was not signed at all, which had the form of the attestation written upon it, but the only attestation was written on the second, when the testator was in a complete state of insensibility.

Here, however, it appears, that the will was duly attested, and the act of the testator in signing it points to nothing prospective. Whatever, therefore, might have been his original intention of signing the former sides of the paper,

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it must be inferred that he had abandoned such intention by his final signature to the last, and that he considered that such signing would be a sufficient execution of the will. I am therefore of opinion that there is no validity in the first objection, and consequently that the original will of 1812 was well executed.

The case then resolves itself into the main question, and on which it has been principally argued, whether, considering that will to be valid, it has been since revoked by the alterations and obliterations made therein by the testator? That will depend upon the particular facts as stated in the case. It appears that the will was duly attested, and that the testator did not intend to die intestate, is evident from the alterations made by him therein, and although in the year 1816, he might wish to make a different disposition of his property, he still intended to dispose of such property, and in point of effect to the same parties, with the exception only of his wife's mother. Besides, a fair copy of the altered will was made, in which he made one alteration only, and which was found, after the testator's death, locked up together with the original in its altered state. The question, therefore, is, whether, if he had intended the altered will to stand in the place of the original, he has carried such intent into execution, or whether, by the alterations, he has done that which he appears to me he did not intend to do, although it has been contended that the obliterations and interlineations amount thereto, namely, to revoke his former will. Wills may be revoked by a variety of methods; but the general doctrine may be comprised in two heads: viz. revocations express, and revocations implied; and under the latter may be classed all those revocations which arise from the construction or inference of intention which the law sounds upon the collateral acts of a testator after making his will; and the principle laid down by all the text-writers appears to be this, that a mere intention, not carried into effect, does not amount to, or operate as a revocation; and I take the

rule to be, that where a testator designs to revoke a former will by an instrument making new dispositions of his property, he discovers only a conditional intention to revoke; or, in other words, his intention to revoke is so coupled, in appearance, with his new testamentary act, that unless he completes such act by observing the formalities requisite to its perfection, he is not looked upon in law as manifesting a deliberate purpose of revoking. The true distinction, therefore, is, that where there is evidence of an intention to revoke, if that intention has not been completely carried into effect, the first will shall stand unrevoked, even though the dispositions of the second be ever so inconsistent with the former. Here, all the alterations, and all the evidence of the intention of the testator to revoke, appear on the face of the will itself; and after making those alterations, if he had intended to effectuate a revocation, he might either have cancelled the will, or he might have destroyed it. However, he has not done so, but merely made some alterations on the face of that instrument which he intended to have adopted in the fair copy which was afterwards prepared; and he did not intend altogether to revoke the devises contained in that will, or to die intestate, but merely to make another will, to alter the effect of some of those previous bequests.

With respect to the revocation of a will by cancellation, it must be observed, that such act is in itself equivocal, and that its operation, as a revocation, depends upon the intent with which it was done; and if a testator does not mean to revoke a former will by cancelling, simply as a self-subsisting and independent act, but by substituting at the same time another perfect will in its place, the effect of such cancelling depends on the validity of the second will, and ought to be taken as one act done at the same time; so that if the second will is not valid, and without which the testator would not have cancelled the first, the cancelling of the first will being dependent thereon, ought to be looked

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it must be inferred that he had abandoned his final signature to the last, and that such signing would be a sufficient answer therefore of opinion that the objection, and consequently the will, well executed.

The case then resolves on which it has been prior that will to be valid, it is the erasures and obliterations will depend upon the original. It appears that the testator did not intend to have any alterations made by the original, nor is the decision applicable to suppose he might have been admitted to sign his name at the time he still intended to have been in point; but as effect to the will it is immaterial whether he signed it or not; but this point was disposed of by the Court, for the will suggested by them in an early part of the argument. The second and main question therefore is, as to the objections and alterations made by the testator in the original will, which point has been so fully gone into by my Lord Chief Justice, that it will be unnecessary for me to say much on the subject. The difficulty that presented itself to my mind, arose from the frequency of the erasures and interlineations, which, it has been contended for the plaintiffs, amounted to a revocation, and virtually avoided the will; but, on looking to the statute of Frauds, relative to questions of this nature, and the cases that have been decided on its construction, this objection appears to me to have but little weight. That statute has pointed out the mode of avoidance of wills, and has provided that "all devises and bequests of lands shall remain and continue in force until the same be burnt, cancelled, torn, or obliterated by the testator, or by his directions; or unless the same be altered by

some other will or codicil in writing, or other writing of the deviser, signed in the presence of three or more witnesses, declaring the same." I think there can be no doubt that the alterations in this will do not fall within the provisions of that statute, either by cancelling or obliterating. Cancellation is, in fact, the result of all, and the obliterations here made do not answer either of these descriptions. Even if they did, it is necessary to consider whether the acts done by the testator were done *animo revocandi*? That is generally a question for the Jury to determine; but in the present instance it has been left to the Court; and I take the rule to be clear, as stated by my Lord Chief Justice from the case of *Onions v. Tyrer*, viz. that if a testator make a second will, and in terms revokes the first, but it appears that the revocation of the first will was only to give effect to the second, the second is no revocation, unless it be completed, or rendered available as a declaration in writing within the statute. If a testator expresses a direct dissatisfaction of his original will, it may, perhaps, have the effect of a revocation; but if his intent is merely to make observations on it, with a view to do some other substantive act to be completed thereafter, it will not amount to a revocation, although it be apparent that the testator intended that a fair copy of the will as altered, should be made and executed. In this point of view, the case of *Doe, d. Perkes v. Perkes* seems to me to bear on the present question; for nothing can be stronger than the feeling the testator there manifested at the moment he began to destroy his will. In a fit of passion, he tore it through twice, and after his death it was found in four parts; but on his anger abating, he folded up the will, torn as it was, and said, "it was a good job that it was no worse," and after fitting the pieces together, he added, "there is nothing ripped that will be of any signification to it." The learned Judge there left it to the jury to say whether the testator had done all he intended, or whether he was not prevented from completing the act of destruction he at first meant;

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and the jury having found that he had not done all that he had intended to do for the purpose of destroying the will, the Court, on a motion for a new trial, held, that it was properly left to them, and refused to disturb the verdict which was given in favour of the devisee. Here, it appears to me to be manifest that the testator did not mean to die intestate, as he merely made some alterations as to the estate the parties were to take, leaving the principal part of the will as it originally stood, and it is equally clear, that he intended that a new will should be afterwards executed, as a fair copy was prepared, but which was never carried into effect. For these reasons, I am of opinion that the obliterations and alterations made in the original will, as coupled with the circumstances of the case, do not amount to a revocation, and therefore that the plaintiffs are not entitled to recover in the present action.

Mr. Justice BURROUGH.—It appears to me, that the statute 29 *Car. 2. c. 3*, is of itself decisive of this case.

With respect to the first point, I think the will was well executed, according to the fifth section of that statute, although an objection has been raised as to the mode of the signature of the original will by the testator. The last sentence expresses, that he had signed his name to the two first sides thereof, and his hand and seal to the last; and he signed the latter as one of the three, which amounted to an express adoption of the whole, and his signature at the end is equivalent to a signature of the three. Neither do I think that the obliterations and interlineations made therein, fall within the spirit or meaning of the sixth section of that act. It has been said, that they have the effect of altering the estate of the trustees, by accelerating their interests as to the freehold property devised to the wife, as they limited her life interest to the term of her widowhood. But even should they have this effect, I do not think the nature of the case would be altered. So, the obliteration of the devise to her mother,

merely expedites the time when the trustees were to have taken possession to execute the purposes of the will; but at all events, these alterations cannot be considered as an obliteration or cancellation within the meaning of the statute of Frauds. It was merely an inception of an act, as expressing the future intent of the testator. That is apparent from his having a fair copy of the will prepared, which he intended should be executed afterwards, but which was never done; nor was it at all carried into effect to make it valid as a will to affect his real estate, and the testator, who appears to have been a professional man, must have known that it should have been duly executed in the presence of three witnesses, in order to render it operative, or that it might amount to a revocation of his original will. Whatever effect the alterations may have as to the personal property of the testator, it is quite clear that it could not alter the devises relative to his real estate. If there be any doubt entertained as to the former, it may be enquired into in the Spiritual Court. I am therefore of opinion, that the plaintiffs are not entitled to recover the title deeds in question from the defendants, who act as executors and trustees under the will.

Mr. Justice RICHARDSON.—I entirely agree with the rest of the Court, in the opinion which I entertain on both points, and on which my Lord Chief Justice has expressed himself so fully. Upon the first, I shall merely observe, that I consider the original will to have been well executed, as the testator did all he intended to do at the time of its execution. As to the second, with respect to the interlineations and obliterations, it turns entirely on a different ground, and I fully concur with the Court in thinking, that he did not intend to revoke, but only to alter his will, or do some further act which was not completed, or carried into effect. Even if he had intended that the alterations in question should have the effect of revoking his will, still, it would not amount to such a revocation as is required by the statute 29 Car. 2.

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c. 3, as it has not been executed as directed by that statute. I concur with my Brother *Burrough*, that the fair copy must have been duly attested, so as to make it valid as a will to affect his real estate. According to the case of *Sutton v. Sutton*, and the other decisions that followed it, I do not think that the alterations in question would amount to a revocation of the devise of the freehold estate of the testator to the trustees; and all the facts of this case shew, that he did not intend to revoke his original will. The interlineations were merely inserted as memoranda, as to the contents of a will to be drawn and executed afterwards. That is apparent from his having a fair copy made of the original will as altered. He therefore never intended to have died intestate as to his real property. The acts of substitution were inchoate and incomplete, until the second will had been duly executed; and as this was never effected, I am of opinion that the original will has not been impeached, and consequently that there must be

Judgment for the defendants.

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GILL and others v. KYMER and others.

Saturday,  
May 24.

**THIS** was an action for money had and received, to which the defendants pleaded the general issue.

At the trial of the cause before Lord Chief Justice *Dallas*, at *Guildhall*, at the Sittings after the last *Michaelmas* Term, the Jury found a verdict for the plaintiffs, damages 2,500*l.* subject to the opinion of the Court, on a case of which the following is the substance:—

The plaintiffs carried on business as merchants, in partnership at *Rio de Janeiro*, under the firm of *Gill, Fielding, and Brander*. The defendants are considerable brokers in *London*. In the beginning of *October*, 1819, *Gill* retired, and a new partnership was formed between the remaining partners, and two other persons, under the firm of *Fielding, Brander, Aveline, and Lyne*. *Joseph Lyne and Co.* carried on business chiefly as commission merchants, in *London*, and also as general merchants on their own account. In the beginning of *December*, 1819, *Joseph Lyne and Co.* received from *Fielding, Brander, Aveline, and Lyne*, a letter containing a bill of lading and invoice. The letter was dated at *Rio de Janeiro*, on the 13th *October*, 1819, and after stating that they had transmitted to them the account current between them and the late partnership of *Gill and Co.*, and requesting them to open a fresh one on account of the new firm, contained the following advice:—Although your letter of the 12th *August*, does not give us very detailed accounts of your market for articles of our produce, in the expectation of the packet meeting with detention after the date thereof, still, we are informed through other sources, of the favourable turn that had taken place with regard to coffee, which has induced those belonging to the late firm, to ship by the *Fortitude, Clement Worts*, master, bound to your port, and addressed to your consignment,

The mere circumstance of a principal's drawing bills on his factor to whom goods were consigned, to be provided for out of the proceeds of such goods, does not authorise the factor to pledge them for the purpose of raising money to meet the bills.

Where, therefore, the factor had become bankrupt, and the pawnee had afterwards sold the goods: Held that the principal might recover as against him the whole of the proceeds of such sale, in an action for money had and received, although the factor had appropriated part of the money advanced by the pawnee, to the payment of one of the bills drawn by his principal.

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533 bags of the first quality, invoice and bill of lading of which you have herewith, the former amounting to Rs.14,579-380, and against the same we have valued on you in six bills, as particularised at foot. We have to request you will dispose of this consignment to the best advantage, and protect us by insuring against all risks.

We remain, &c.

Fielding, Brander, Aveline, and Lyne.

The list of these six bills was headed, "Note of bills drawn against shipment per *Fortitude*."

619*l.* 15*s.* 10*d.* Order *Thomas Izon*, value of *J. D. Thomson* and Co., dated 11th October.

294*l.* 5*s.* 6*d.* *John Carmichael*, ditto.

77*l.* 11*s.* 11*d.* *W. J. Bell*, ditto.

36*l.* 10*s.* 9*d.* *James S. Pott*, value of *Brown, Watson*, and Co., ditto.

160*l.* 1*s.* 7*d.* *John and Edward Brooke* and Co., value of *W. March* and Co., ditto.

400*l.* 0*s.* 0*d.* *Fultons* and Co., value of *William Bory*, ditto.

£1588. 5*s.* 7*d.* sterling, in six bills at 60 days sight."

The invoice accompanying the letter commenced thus:—

"*Rio de Janeiro*, 13th October, 1819.

"Invoice of 533 bags of coffee shipped by *Fielding, Brander, Aveline*, and *Lyne*, on board the *Fortitude*, *Clement Worts*, master, bound for *London*, and consigned there to Messrs. *Joseph Lyne* and Co., for sale, on account and risk of Messrs. *Gill, Fielding*, and *Brander*."—The bill of lading also stated, that the coffee was shipped by *Fielding, Brander*, and Co., and consigned to Messrs. *Joseph Lyne* and Co., or their assigns, he or they paying freight for the same.

The ship arrived with the coffee on board, in the beginning of *February*, 1820. *Joseph Lyne* and Co. had previously

sold the coffee to the defendants for arrival, on condition that it arrived by a specified time; but as it did not arrive by that time, they refused to accept it, and this bargain was at an end. On the 12th *February*, the coffee in question was put into the hands of the defendants, as brokers, for sale. *Charles Lyne*, a partner in the house of *Joseph Lyne and Co.*, called upon the defendants and stated, that their refusal to accept the coffee as purchasers would very much inconvenience his house, as they were drawn upon against it; and asked them if they would make an advance upon it, to enable *Joseph Lyne and Co.* to meet those bills, observing, that they did not want money exactly, and that a bill of 3000*l.* at two months would do. After some conversation about the weight of the coffee, *Charles Lyne*, at the request of the defendants, fetched the invoice and delivered it to them. After they had looked at it, they made some calculations, and consented to advance 2500*l.* upon the coffee. They accordingly accepted a bill on that day for such amount, at two months, which *Joseph Lyne and Co.* immediately discounted with their bankers, for the purpose of meeting the several bills that were becoming due, and the bill for 294*l.* 5*s.* 6*d.*, payable to the order of *Carmichael*, mentioned in the letter of the 13th *October*, was paid out of the funds so raised. All the other bills were retired on behalf of the plaintiffs, and were never any charge upon *Lyne and Co.* or their estate. At the time of the above advance, the coffee being in the *West India Dock* warehouses, the transfer order to the Dock Company was handed to the defendants, and they were empowered to sell, but they were to consult with *Lyne and Co.* before the sale, as to the price. The defendants, on the 15th *March*, 1820, sold the coffee for *Joseph Lyne and Co.*, and on the 18th *April* following, rendered an account of the sale, by which it appeared, that the net produce thereof amounted to 4033*l.* 0*s.* 6*d.*

On the 15th *February*, 1820, *Joseph Lyne and Co.* stopped payment, and a commission of bankrupt was after-

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wards awarded against them. At the time they stopped, they were indebted to the old firm of *Gill, Fielding, and Brander*, and also to the new firm of *Fielding, Brander, Aveline, and Lyne*. The bill for 2500*l.* was duly paid by the defendants.

The Jury found specifically as a fact, that at the time the defendants agreed to advance the 2500*l.*, it was known to them that the coffee was the property of the plaintiffs. The defendants paid into Court the sum of 1533*l.* 0*s.* 6*d.*

The question for the opinion of the Court was, whether the plaintiffs were entitled to recover the entire balance of 2500*l.*, or only part of it. If the Court should be of opinion that they were entitled to recover the whole, then the verdict was to stand; if less than the whole, the verdict to be reduced accordingly; and if the plaintiffs were not entitled to recover at all, a nonsuit was to be entered.

The case came on for argument this day, when

Mr. Serjt. *Taddy*, for the plaintiffs, submitted, first, that they were entitled to recover the whole balance of 2500*l.* Secondly, that at all events, the defendants could only deduct the sum of 294*l.* 5*s.* 6*d.* applied by *Lyne and Co.* to the payment of the bill drawn by the plaintiffs, payable to the order of *Carmichael*; and, thirdly, that they were entitled to recover as for money had and received by the defendants to their use; and that the only distinction in this form of action was, that they could only recover the money actually received by the latter, and not the value of the coffee, which they might have been enabled to do, had they brought an action of trover.—First, it is a general principle, and settled rule of law, that a factor has no authority to pledge the goods of his principal. That principle was recognized and adopted in the case of *Martini v. Coles* (a), where all the previous au-

(a) 1 Maul. & Sel. 140.

thorities were referred to and maturely considered. *Patterson v. Tash* (a), and *Daubigny v. Ducal* (b), are confirmatory of this principle; and in *De Bouchout v. Goldsmid* (c), it was held, that it was of no consequence that the pledgee was ignorant of the factor's not being the owner; and Lord *Loughborough* there said (d), "There is no doubt that if goods are consigned to a factor to sell, he cannot pledge them: it must be a *bonâ fide* sale for valuable consideration. I take it not merely to be a principle of the law of *England*, but by the civil law, that if a person is acting *ex mandato*, those dealing with him must look to his mandate."

This case therefore, ranges itself under the principle which has been adhered to in former decisions, except that in some of those, the advances were made generally on the credit of goods of third persons in the hands of the factor, and not on goods which form the specific ground of action: but that makes no difference, nor does it cease to be a pledge, whether the property pledged be more or less extensive, or whether it be mixed or complicated with the property of others. Here, however, it is stated as a specific fact, that when the advances were made by the defendants, it was stated to them by *Lyne* and Co. that bills were drawn by the plaintiffs, against the coffee consigned to them. That, too, is immaterial; for the defendants knew that the coffee was consigned to *Lyne* and Co. for sale; and they were also well aware of the situation in which they stood with respect to the plaintiffs, as their principals. No hardship, therefore, can be urged on the part of the defendants, who had a full and perfect knowledge of all these facts. By the advance they made to *Lyne* and Co., they took upon themselves the risk of their applying such advance properly. Besides, the defendants did not take up the bills drawn by the plaintiffs on *Lyne* and Co., but gave their acceptance for

(a) 2 Stra. 1178. — (b) 5 Term Rep. 604. — (c) 5 Ves. 211.  
(d) Id. 213.

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the whole advance to the latter as the factors of the plaintiffs, out of the proceeds of which acceptance, only one of those bills was paid, viz. that for 294*l.* 5*s.* 6*d.* In *Martini v. Coles*, Mr. Justice Bayley put this very case; for he said (a), "Cases may perhaps exist, where a principal would be bound by a pledge made by his factor; but supposing one of those cases to be where money has been advanced in payment of a bill drawn by the principal for part of the price of the goods, it is not so found here; on the contrary, the claim is in respect of general advances; and if it had been so found, I do not say that it would have made any difference." Even in the case of a factor, whose course of dealing justifies the implication of an authority to sell, the sale must be absolute, in order to be binding upon the principal; for if goods be placed in the hands of third persons, not as buyers, but for the purpose of obtaining a buyer, this disposition of the property amounts to a pledge, and the pawnees have no right to retain it, or the proceeds of it from the principal, although they may have made advances to the factor upon it. *Shiple v. Kymer* (b).—Secondly, as to whether the defendants can deduct the amount of the bill paid by *Lyne and Co.* to the order of *Carmichael*, more facts should have been found in the case, in order to entitle them to claim that deduction. It is not enough that the money happened to be so applied. The authority given by the plaintiffs to *Lyne and Co.*, as factors, was to sell, and apply the proceeds of the sale in discharge of the bills so drawn. These bills were drawn at sixty days sight; and the plaintiffs therefore contemplated that the coffee might be sold before the arrival of the bills, or, at all events, before they should become payable; but no sale was effected until a long time afterwards, and before it took place, a commission of bankrupt had intervened against *Lyne and Co.* They had not pursued the authority

(a) 1 *Maul. & Selw.* 150. — (b) *Id.* 484.

given them by the plaintiffs, and therefore their assignees cannot claim the sum advanced by the defendants under their commission. Besides, *Lyne* and *Co.* were indebted to both the old and new firms of the plaintiffs, and therefore by taking the bill into account, the balance would be altered.

Thirdly, as to the form of action, it only precludes the plaintiffs from recovering more than the sum received by the defendants as the produce of the sale, and not the value of the coffee. It may be contended for them, that the plaintiffs have affirmed the contract under which the money was received by bringing the present action; but they go wholly beside the agreement made between *Lyne* and *Co.* and the defendants:—the coffee has been converted into money by the latter, and the plaintiffs have therefore a right to claim the amount as money had and received on their account, by confining themselves to the receipt of that sum, and not adopting any antecedent arrangement between the parties. It would be a different case, if a special action had been brought on the agreement; but the plaintiffs have a right to recover the proceeds of the sale of the coffee as though it was the coffee itself, as they may be considered as utter strangers to the terms under which it had been deposited with the defendants. Although in *Smith v. Hodson* (a), where a bankrupt, on the eve of his bankruptcy, sold goods to a creditor, with a view to a fraudulent preference: but the assignees brought an action of *assumpsit* for goods sold and delivered, the form of the action was held to be an affirmation of the contract of sale, so as to entitle the creditor to set off his debt:—yet that case is distinguishable from the present, as there, the plaintiffs declared for goods sold and delivered, whilst here, they merely seek to recover the money which the defendants had received for the proceeds of the sale of the coffee.

In *Wright v. Campbell* (b), Lord Mansfield said, that “if a factor pays over money, with notice, to a third per-

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(a) 4 Term Rep. 211.—(b) 4 Burr. 2050.

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son, then it may be followed in the hands of such third person; for, in such case, it remains in his hands just as it did in the hands of the factor himself." So, Mr. Justice *Le Blanc*, in *Shiple v. Kymer*, observed (a), that "the plaintiffs' agents were in the habit of employing the defendants, and placing cargoes in their hands for sale, and of drawing bills upon them on account of such cargoes. This therefore was a habit of dealing, not by way of sale to them of such cargoes, but by drawing in advance upon them as upon a pledge. It was placing goods in their hands, and drawing upon them on account, not in the character of principals receiving payment for the goods, but in that of brokers employing others to make sale for them, and receiving a gross sum in advance, to be afterwards adjusted when the proceeds were finally accounted for. If then the plaintiffs afterwards interpose as principals, and call in the defendants as brokers, before they have accounted with the agents, they have a right so to do, and recover the money." Although in *Pultney v. Keymer* (b), it was determined, that where a consignee of goods, for the purpose of sale, deposited them with a broker, who, on the faith of that deposit, advanced money to pay the duties and other charges upon those goods, such broker must stand in the situation of the consignee, and was entitled to retain till his advances were satisfied; still, the different decisions on this subject were not brought before Lord *Eldon*, by whom that case was tried, and on its being cited in *Martini v. Coles*, Lord *Ellenborough* observed (c), that "there the broker had a lien for the duties, and that Lord *Eldon* held that he was not bound to take the indemnity of another in lieu of his lien." (d)

(a) 1 Maul. & Selw. 492. — (b) 3 Esp. Rep. 182. — (c) 1 Maul. & Selw. 145.

(d) The case of *Pultney v. Keymer*, appears to have been over-ruled by *Solly v. Rathbone* (\*) and *Cockran v. Irlam* (†), where it was held, that where there is no privity between the person in possession of goods and the actual proprietor thereof, no lien can be acquired.

(\*) 2 Maul. & Selw. 298.

(†) Id. 301.

Mr. Serjt. *Bosanquet* for the defendants.—At all events, the plaintiffs cannot be entitled to recover in this form of action, as they have thereby not only recognized the right of *Lyne* and *Co.* to put the coffee into the hands of the defendants, but also the terms under which it was so placed, viz. of selling it as soon as possible, and of making an advance in anticipation of such sale; and as they have made the advance in question to a recognized agent of the plaintiffs, on account of the proceeds of the coffee, they are entitled to be allowed the same, and consequently it cannot now be recovered as money had and received to the plaintiffs use. If the defendants have wrongfully converted the coffee into money by the sale, and received the proceeds thereof, the money resulting from it is not the money of the plaintiffs, but of the defendants, and in that case, trover is the only proper remedy, in which action the plaintiffs might recover damages commensurate with the injury they have received, and where they might have elected to treat the sale as being unauthorized by them, whereas, by bringing the present, they have admitted such authority; for when *Lyne* and *Co.* were authorized by the plaintiffs to sell, and pay the bills transmitted to them from the proceeds of the coffee, it must be implied that they had received a general authority to raise money for the purpose of satisfying those bills. As, therefore, they were authorized to deposit the coffee with the defendants for sale, it is necessary to look at the facts of the case. The transaction between those parties took place at one and the same period, for when the defendants accepted the authority to sell, they did so, on the terms of making an immediate advance. The plaintiffs might have disputed those terms in trover, but not in an action for money had and received. The case of *Smith v. Hodson* is a strong authority on this point, but the principle is with the defendants, even without resorting to that decision. As to whether *Lyne* and *Co.* were authorized by the plaintiffs to enter into the engagement with the defendants respecting the advance, the ge-

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neral rule cannot be disputed, that a factor cannot pledge the goods of his principal, nor that he who deals with another under a special authority, renders himself liable if such authority be exceeded; neither is there any distinction whether a person dealing with a factor, knows at the time whether the goods belong to him or not; but the question here is, whether *Lyne* and *Co.* were not authorized to do what they have done? It is quite clear that they were; and equally so, that the defendants ought to be entitled to the benefit of this transaction, for the bills drawn by the plaintiffs were to be provided for out of the sale of this particular cargo. It is not stated in the case when the bills arrived, but it must be presumed that they came to hand before the coffee. *West India* merchants, who consign goods to this country, employ brokers to sell, who are allowed in respect of any advances that may be made by them from the proceeds of the sale. So, here, *Lyne* and *Co.* were not only authorized to employ the defendants to sell, but were entitled to deduct the duties and pay the charges attending such sale; and it was also within the scope of their authority to agree with the defendants to make an advance to them before the sale was effected. The case of *Pultney v. Keymer*, has not ceased to be acted on, but was mentioned and recognized in *Martini v. Coles*, and Lord *Eldon* was there of opinion, that "if a man has given his acceptances on the faith of goods sent into his hands, and they are outstanding, he is not bound to take the promise or counter-acceptance of any man." That doctrine was not impeached by Lord *Ellenborough*, in *Martini v. Coles*, but his Lordship merely drew a distinction between the two cases; and in delivering his judgment in the latter (*a*), he said, the defendants received the goods in order to sell them, which makes the only distinction between this and the former cases, viz. that here the possession of the defendants was legal in the first instance. The defendants then having authority to sell the goods, if they had advanced money for

(a) 1 Maul. & Selw. 147.

any purposes connected with the sale, and for which, brokers in the ordinary course of disposing of goods are accustomed to advance it, they would have had a lien in respect of such advance. So, Mr. Justice *Le Blanc* observed (a), "If advances were made merely to take up a bill of the consignor, and were appropriated to that purpose, there would be no mischief; and that might be considered in furtherance of the authority given by the principal; but if a party make advances to a factor, without enquiring for what purpose they are made, he must be contented to rest on the authority by which it shall appear that the factor is clothed." That distinction is particularly applicable to the present case, and that put there by Mr. Justice *Bayley* (b), is also extremely favourable to the defendants.

The case of *Duclos v. Ryland* bears a strong analogy to the present (c), and the only difference is, that there the factor pledged the goods as his own property, and received the amount in advance, and the defendant did not know that they belonged to another person; and Lord Chief Justice *Abbott* reserved the case for the opinion of the Court of *King's Bench*, and his Lordship intimated an opinion that the defendant was justified in withholding the goods until certain advances were paid which he had made, and more particularly so, as he did not know to whom they belonged at the time they were left with him for sale. Here, there was a special authority given by the plaintiffs to *Lyne and Co.* the consignees, to raise money by the sale of the coffee, for the express purpose of providing for those bills which had been drawn against it.

As, therefore, *Lyne and Co.* had a special authority vested in them to provide for those bills, they were justified in receiving the advance offered by the defendants, for the purpose of meeting them when they should become due, or at all events, as they have paid the sum of 294*l.* 5*s.* 6*d.* on the bill payable to the order of *Carmichael*, they are en-

(a) 1 Maul. & Selw. 149.——(b) *Id.* 150.——(c) See post, page 518.

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titled to deduct its amount, and the plaintiffs having received the benefit of it, cannot be entitled to recover it a second time, or it may be considered as money paid by the defendants to the plaintiffs' use, for duties and other necessary charges attending the sale.

Mr. Serjt. *Taddy*, in reply.—With respect to the objection as to the form of action in this case, it has been considered from that of *Moses v. Macfarlane* (a), where Lord Mansfield explained the principles on which an action for money had and received was maintainable, to the present time, that by bringing such an action, the plaintiff rather disaffirms than affirms the authority of the contract on which it is founded. So, in *Tenant v. Elliott* (b), it was held, that *A.* having received money to the use of *B.* on an illegal contract between *B.* and *C.*, could not set up the illegality of the contract as a defence in an action brought by *B.* for money had and received. [Mr. Justice *Park*.—The same principle is laid down in *Clark v. Shee* (c), where it was decided, that if money of the principal has been fraudulently applied by an agent to an illegal and prohibited purpose, it may be recovered back by the principal, provided the fraudulent holder of it can be clearly traced, and by that means shewn to be his.] By bringing an action for money had and received, the plaintiff merely seeks to establish that there is money in the defendants' hands, to which the former is entitled, but he does not thereby disclose the circumstances under which the latter obtained it.—As to the main point in this case, if it be held that a broker may advance money to a factor, where the consignee draws on such factor, the whole doctrine prohibiting a pledge by a factor will be undermined, and the policy of the law on which that principle has proceeded, will be entirely overturned, and it will be equally injurious to the general purposes of mercantile transactions. In *Newsom v. Thornton* (d), it was determined that a factor cannot pledge

(a) 2 Burr. 1005. —(b) 1 Bos. & Pul. 3. —(c) Cowp. 197.  
 (d) 6 East, 17.

the goods of his principal by indorsement and delivery of the bill of lading, any more than by the delivery of the goods themselves, though the indorsee knew not that he was the factor; and Mr. Justice *Lawrence* said (a), that "there was no ground in that case to complain of the defendants' having been deceived by means of the bill of lading, for it would have been very easy for them to have enquired for the letter of advice which brought it, which would have shewn that the consignee held it as a factor, and not as vendee of the goods, and that if persons will neglect all precaution, and advance money on goods without enquiring whether the party had any right to dispose of them or not, they must bear the loss, if it turn out that he had no authority so to do."

The case of *Pultney v. Keymer*, might have been either stronger or weaker than the present. At all events, it is mainly distinguishable, for here, the defendants knew that the cargo of coffee was consigned to *Lyne and Co.*, for the purpose of sale, which only amounts to an authority coupled with a duty imposed on them to sell, but not to pledge, although the plaintiffs informed *Lyne and Co.* that they had drawn on them against the proceeds of the sale. Their merely drawing those bills did not give any additional authority to *Lyne and Co.* to raise money in advance, either by implication or otherwise, and the defendants had full notice that it was consigned for the purpose of sale only; it was therefore the duty of *Lyne and Co.* to apply the produce of the coffee in discharging the bills after the sale had taken place, but not before. Besides, 294*l.* 5*s.* 6*d.* only, was appropriated to the discharge of one of those bills; and all the residue was misapplied. As to the case of *Duclos v. Ryland*, a foreign merchant consigned goods to his correspondent in *England*, but no bills were drawn by him at the time of the consignment, and he was indebted to such correspondent at the time. There, too, the balance was in favour of the

(a) 6 East, 43.

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factor, but here, it was quite otherwise. There also, it did not appear who the real owner was, whilst here, the defendants had full knowledge of all the circumstances attending the nature of the consignment. Under these circumstances, therefore, the plaintiffs are entitled to recover the whole balance as found for them by the Jury, being the amount of the sum advanced by the defendants to *Lyne and Co.*, and who had misapplied the same previously to their bankruptcy.

Lord Chief Justice DALLAS.—Speaking at the moment, and for myself, I entertain no doubt whatever on this case. The general rule of law is clear, that a factor who is empowered by his principal to sell, has no authority to pledge the goods of such principal; and I consider this to be in the nature of a pledge to a person advancing a sum of money to a factor, before the goods of his principal were sold. How has this been attempted to be distinguishable from other cases? No trifling distinction will tend to repeal a general rule. It appears that bills of exchange were drawn by the consignors upon the consignee against the consignment; and it has been mainly contended that the drawing those bills amounts to an authority to the factor to whom the cargo was consigned, to raise money by way of advance, to meet such bills when they should become due. Is there any case of a consignment of *West India* produce to this country, where bills are not drawn, to be provided for out of the proceeds of such produce when sold? If therefore, according to the argument which has been adopted for the defendants, the act of drawing bills at the time of the consignment, would give an authority to the consignee to pledge; it would tend to repeal the general and well-established rule, that a factor cannot pledge the goods of his principal. The facts of this case are as strong as they can possibly be. Formerly, an inference of ownership was created by possession of property; but here, it has been found as a substantive fact, that

the defendants had full knowledge that the coffee on which they advanced the sum in question, viz. 2500*l.*, to the defendants, was not the property of *Lyne* and *Co.*, the consignees, but that it belonged to the plaintiffs. In *Martini v. Coles* Mr. Justice *Le Blanc* observed (*a*), that "whether it might not originally have better answered the purposes of commerce to have considered a person, in the situation of *Vos*, (the consignee and factor) having the apparent symbol of property, as the true owner, in respect of that person who deals with him under an ignorance of his real character, is a question upon which it is now too late to speculate, since it has been established by a series of decisions that a factor has no authority to pledge, whether the person to whom he pledges, has or has not a knowledge of his being a factor." And he went on to state that "when brokers exceed their authority as brokers, and become pawnbrokers, by advancing money on the goods before sale, then they subject themselves to all risks." The only difference between that case and the present is, that here, the defendants had actual knowledge at the time they agreed to make the advance in question, that the coffee was the property of the plaintiffs, and not of *Lyne* and *Co.* who pledged it;—whilst there, the advances were made by the brokers to the factor, without their knowing that he was not the owner of the goods. It has however been insisted, that *Lyne* and *Co.* were authorized to raise money by way of advance before the coffee was sold, because the plaintiffs had drawn bills to be provided for out of the proceeds thereof, and that the defendants were justified in making such advance, although they knew that *Lyne* and *Co.* were factors only, and not the owners. But a factor derives no authority to pledge, because bills are drawn against goods consigned to him for the purpose of sale. Here, therefore, it appears to me that *Lyne* and *Co.* were not authorized to borrow money from the defendants on the coffee deposited with them, nor were they justified in

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(a) 1 Maul. & Selw. 148.



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making the advance. They cannot repeal the law as to the power given to factors or other agents in the disposition of goods of their principal; and more particularly so, as here, they had full knowledge of the circumstance to whom the coffee belonged; neither can they avail themselves of any illegal agreement which they might have entered into with *Lyne and Co.*, to defeat the rights of third persons. At present, therefore, I am inclined to think, that the plaintiffs are entitled to recover the entire balance as found by the Jury; and I should have had no hesitation in expressing that as my decided opinion, had it not been for the case of *Duclos v. Ryland*, which was mentioned in the course of the argument, and in which it was stated that a similar question was reserved by Lord Chief Justice *Abbott* for the opinion of the Judges of the Court of *King's Bench*. On that ground only, is my final decision of this cause suspended; and if it be not mentioned again, it may be considered that the plaintiffs are entitled to judgment (a).

(a) The Reporter has been favoured by a Gentleman at the Bar with the decision of the Court of *King's Bench* in that case, and as it corresponds with the present in principle, he has ventured to insert it by way of note.

K. B.
Trinity Term,
 2 Geo. 4.

DUCLOS v. RYLAND and Another.

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 Where a foreign merchant consigned goods to his correspondent in London, who pledged them with a factor as and for his own property, and received the amount in advance, and afterwards became bankrupt:—Held, that the factor was liable to the foreign merchant in trover for the goods.

THIS was an action of trover for seed. The defendants pleaded Not Guilty.

At the trial of the cause before Lord Chief Justice *Abbott*, at *Guildhall*, at the Sittings after *Trinity Term*, 1820, the Jury found a verdict for the plaintiff, subject to the opinion of the Court on the following case:—The plaintiff was a merchant at *Caen*, in *Normandy*. The defendants were corn-factors in *London*. In *December*, 1818, the plaintiff consigned for sale to *Prosper Caumont*, (who was both a merchant trading on his own account, and a commission-agent), 12 bales of lucern seed and 13 bales of clover seed.

On its arrival in *London*, on the 22nd *December*, 1818, *Caumont* entered it in his own name, paid the duties, and landed it, and immediately afterwards deposited it with the defendants for sale. On the 30th of that month the defendants, for the accommodation of *Caumont*, accepted bills at two months date to the amount of 3000*l.*, on the security of these and other goods warehoused with them by *Caumont*, which bills

Mr. Justice PARK.—From the beginning to the end of the argument in this case, I have not entertained a doubt for a single moment. I consider it to be a settled point, that a factor has no authority to pledge goods entrusted to him by his principal for sale. That was decided in this Court in the late case of *Guichard v. Morgan* (a), where the defendants as brokers for *B. and Co.*, effected two purchases of seed, both of which were paid for by *B. and Co.*, and left in the defendants' warehouses for the purpose of re-selling.—The first was made on account of *B. and Co.*, and the other for the plaintiffs, resident abroad, and by their express order; but the invoices of both were made out in the names of *B. and Co.*, who did not inform the defendants that the latter purchase was not made on their account; and it was held, that the defendants having made advances to *B. and Co.* could not retain possession of the seed against the plaintiffs. Here, however, it has been contended that the

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they afterwards paid. On the 9th January, 1819, *Caumont* stopped payment, and on the 4th of February following was declared a bankrupt.

At the time of *Caumont's* depositing the seed with the defendants, he was in advance for the plaintiff, in account current, about 509*l.* but previous to his stopping payment, viz. on the 6th January, he drew a bill upon the plaintiff for 500*l.*, which bill was duly accepted and paid, and the remaining balance was afterwards paid by the plaintiff to *Caumont's* assignees. On the day that *Caumont* stopped payment, he then, for the first time, communicated to the defendants that the plaintiff was the proprietor of the seed in question. On the 24th April, the seed, was first, on the part of the plaintiff, demanded from the defendants, who desired time to consider whether they would deliver it. On the 15th June the defendants declared their intention not to deliver the seed, and on the next day, upon a formal demand, refused to deliver it, and afterwards gave notice that the clover seed had been some time previously sold.—That seed had in fact been sold and delivered by the defendants, and the net proceeds, amounting to 96*l.* 9*s.* 11*d.*, had been placed by them to account with *Caumont*, previous to the 24th April, viz. on the 17th February, 1819.

The lucern seed was unsold at the time of the trial, and still continued so. When the demand was made, the plaintiff offered to pay

(a) Ante, vol. iv. page 36.

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defendants were justified in making the advance, as the principals, who resided abroad, drew bills against the coffee consigned to *Lyne and Co.*, their factors, for sale; but it is the constant course of trade, when consignments are made to this country from abroad, for the merchant resident there to draw bills, to be provided for out of the proceeds of such consignment when the goods are sold. The mere drawing of bills by the consignor at the time of the consignment, does not alter the obligation or duty of a factor with respect to his principal, so as to allow the factor to pledge the goods consigned to him. The consignor presumes that the goods will be sold, and that the consignee will have cash in hand from the proceeds of such sale to enable him to take up the bills when due. The only question then, is, whether the plaintiffs in this case had authorized *Lyne and Co.* to require

to the defendants the warehouse rent, and all other charges on the clover and lucern seed.

The questions for the opinion of the Court, were:—Whether the plaintiff was entitled to recover the value of the clover seed and lucern seed, or either of them; if he was entitled to recover for both, then the verdict was to be entered for him for 96l. 9s. 11d., and the lucern seed to be forthwith delivered up to the plaintiff, on payment of charges; and if for the lucern seed only, then a verdict to be entered for one shilling, with costs, and the said seed to be delivered up on payment of charges; but if the Court should be of opinion, that the plaintiff was not entitled to recover for either, then a nonsuit was to be entered.

Mr. *Barnewall*, for the plaintiff, contended, that this was the case of a factor, pledging the goods of his principal, and therefore, according to the clear rule of law in such cases, the plaintiff was entitled to recover back his property. There was no new point to be raised in the case; and if there were any authority wanting on the subject, that of *Kuckein v. Wilson* (a) was of itself decisive. There, the plaintiff, a foreign merchant, residing abroad, had consigned a cargo of oats for sale to *Sellers and Newton*, factors and merchants, at *Hull*. At that time, the latter were under some advances to the plaintiff, and soon after the arrival of the oats, they accepted bills of exchange on account of expected proceeds of the cargo. The oats arrived on the 30th September, 1818, and on the 22nd December, *Sellers and Newton* placed them in the hands of the defendants, *Wilson and Co.*, who were also factors and merchants at *Hull*, as a pledge for money advanced. The oats

(a) 4 Barn. & Ald. 443.

the advance from the defendants at the time they delivered the invoice to them; and from the facts, as stated, I am of opinion that they had not. Although *Lyne and Co.* might have had a lien on the coffee, which would entitle them to retain it as against the plaintiffs, yet, this being a personal right, it could not be transferred to the defendants as pawnees, so as to give them a title even to the amount of the lien; for in *Daubigny v. Duval* (a) it was decided, that if a factor pledge the goods of his principal, the latter may recover the value of them against the pawnee, on tendering to the factor what is due to him, without any tender to the pawnee. The interest of the principal and factor, therefore, is only to be attended to, and not that of a third person. As to the case of *Duclos v. Ryland*, I can form no judgment on it, not having seen it; but after the series of decisions which appear to me to have set the

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remained in the hands of the defendants until the month of August in the following year, when *Sellers and Newton* proposed that the defendants should become absolute purchasers of the oats at the then market price, which they agreed to do, giving the former credit for the whole of the proceeds, in account; and in pursuance of an order for delivery, the oats were delivered to other purchasers of the defendants. Soon after this, *Sellers and Newton* became bankrupt, and the plaintiff having received no fruits of his consignment, he brought an action of trover against the defendants for the oats.

The question was, whether, under the circumstances, he could recover, it being contended that the sale by *Sellers and Newton* to the defendants was *bonâ fide*, and consequently, though the oats might have been originally pledged to the defendants by *Sellers and Newton*, in breach of their duty as factors, yet, the subsequent sale for valuable consideration, rendered it an ordinary mercantile transaction. The Court, however, were clearly of opinion, that the action was well brought, and that the plaintiff was entitled to recover. This case is directly in point, and removes all doubt and difficulty upon the subject, and consequently judgment must be given for the plaintiff.

Mr. *Ryland*, *contra*, said, the only question was, whether the goods were or were not, in fact, pledged. It is quite clear, that where goods are tortiously pledged by a factor, his principal may by law recover

(a) 5 Term Rep. 604.

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question at rest as to the right of a factor to pledge the goods of his principal, I should scarcely suppose that the Chief Justice of the *King's Bench* would now reserve such a point for the consideration of that Court, or that the general principles on which such decisions have been founded should now be attempted to be qualified or impugned. Besides, it is now further settled, that it is of no consequence that the pledgee is ignorant of the factor's not being the owner, although the fact of such ignorance, has, in former cases, been pressed upon the Courts as a great hardship. But that is not the case here, for the Jury have specifically found, that at the time the defendants consented to make the advance, they knew that the coffee was the property of the plaintiffs, and that they dealt with *Lyne and Co.*, as their factors.

Mr. Justice BURROUGH.—I have merely to add, that

them back again, as was held in *M'Combie v. Davies* (a), and *Martini v. Coles* (b), but here, there was in fact no pledge; for the goods were deposited in the defendants' hands for sale, they not knowing at the time but that they were the property of *Cassmont*. They advanced their money to him upon the faith that they belonged to him, and the 24th of April was the first moment they knew that the plaintiff had any interest in the goods, being long after they were deposited with the defendants. The pledge must be tortious to entitle the plaintiff to recover. Here, it was evidently a *bona fide* transaction on the part of the defendants; they were perfectly innocent, and advanced their money to *Cassmont*, believing him to be the owner, and were kept in a state of ignorance that the seeds were the property of any other person.

To hold that the defendants, under these circumstances, were liable, would be to destroy all commercial confidence, and no foreign merchant could ever expect that a *British* merchant would advance his money upon the security of his consignments.

It is the universal practice for the factor in this country, to make advances to the foreign merchant for his convenience and advantage; for, without such a mode of accommodation, the latter would never be able to make his consignments, and wait the result of the sale.

Lord Chief Justice ABBOTT.—It is now too late to consider whether a factor can or cannot pledge the goods of his principal. The rule of law is too well established to be now disturbed. The argument which has

(a) 5 East, 5.—(b) 1 Maul. & Selw. 140.

this case appears to me to stand on the ordinary ground of a factor's pledging the goods of his principal. That in ordinary cases he has no authority to do so, has been long since settled, and may be now considered as the established law of the land; and if parties seek to vary that law, it can only be done by an express agreement or contract between themselves. I should have had no doubt whatever, but that the plaintiffs are entitled to recover, except for the case of *Duclos v. Ryland*, which has been stated to embrace a question of precisely the same complexion as the present.

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Mr. Justice RICHARDSON.—If any doubt be entertained on a question similar to the present, elsewhere, I agree with the Court in thinking that this case ought not to be finally decided, before the result of that question be ascertained; but it now appears to me that the plaintiffs are entitled to recover the sum found for them by the Jury. The general rule that a factor cannot pledge the goods of his principal, would be in a great measure destroyed, if a consignee might

been addressed to us, as to the hardship of the law, has been urged in every case in which this question has been considered. The answer to it is, that he who advances his money ought to take care to protect himself against the fraud of the person to whom he advances. This caution is as necessary to the foreign as the *English* merchant. He who sends his goods to this country for sale, ought to be secure in the confidence he reposes in the honesty of our merchants. That is the policy of the *English* mercantile law. The rigid adherence to the rule, that a factor cannot pledge the goods of his principal, will only have the effect of making people more careful how they advance their money; and nothing is more easy than the exercise of that caution, *viz.* by requiring the person who desires to have an advance of money, to shew his title to the property on which he asks such advance. This will not destroy that wholesome confidence which ought to exist between merchants.

If people will blindly advance their money to those who ask for it, without exercising a little caution, they must take the consequences of their own indiscretion. I am of opinion that this was clearly an unlawful pledge, and that the plaintiff is entitled to recover.

Mr. Justice BAYLEY.—It is not necessary that the pledge should be tortious, in order to give effect to the rule of law in cases of this de-

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raise money by way of advance, to provide for bills drawn by the consignor against the goods consigned. Here, the sum advanced by the defendants was for the accommodation of *Lyne and Co.* to whom they gave their acceptance for 2500*l.*, and the amount of the bills drawn by the plaintiffs against the coffee, on which this advance was made, amounted to only 1588*l.* 5*s.* 7*d.*, one of which, for 294*l.* 5*s.* 6*d.*, was paid by *Lyne and Co.* out of the sum so raised by them. It does not appear that the defendants, when the advance was made, enquired into the amount of the bills drawn by the plaintiffs against the coffee, but only as to the value of the article consigned. It appears to me that the general rule must equally apply, whether bills are drawn by the consignor against the consignment or not. With respect to the form of this action, I think there is nothing in the objection which has been raised against it. It has been said, that as it has been brought by the plaintiffs for money had and received, they have thereby affirmed the contract with *Lyne and Co.* and the defendants, as to the terms of the

scription. A factor has no right, under any circumstances, to pledge the goods of his principal for his own benefit. How are foreign merchants to be protected, unless the courts of this country give effect to this principle of law? They will have no protection, and the consequence will be, that foreign merchants will cease to have any intercourse with this country.

In *Paterson v. Gandasequi* (a), and in other cases, it was held that the pawnee can have no better right than the pawner had to the goods, and if the pawner takes upon himself to pledge, contrary to his authority, that shall not bind the original proprietor, but he shall have a right to recover them from the pawnee.

That is the general rule applicable to property consigned to this country by principals residing abroad. It may be, that it is the confidence which foreign merchants place in the strict observance of this rule, which induces them to send their property here; and I believe, that a vast proportion of the foreign commerce of this country is attracted to it, because the foreign merchants know that this is the law of the kingdom; being conscious, that though they may be bound by a sale made by their factor, they will not be bound by his pledge of their property.

Mr. Justice HOLROYD.—I am of the same opinion. It is a rule
 (a) 15 East, 62.

advance agreed on by the former. But it has no such effect, for the action proceeds on the ground of the defendant's having obtained and sold goods of the plaintiffs without their consent or authority to do so. It therefore disaffirms any contract which the defendants may have made with *Lyne* and *Co.* as agents of the plaintiffs; and as the defendants have money in their hands belonging to the plaintiffs, the law will raise an implied promise, on which the latter are entitled to sue. It has been decided in a variety of cases, far stronger than the present, that a party who receives an injury, may waive the tort, and declare in assumpsit; as where goods are wrongfully taken and converted into money, the plaintiff may waive the tort for the conversion, and bring assumpsit for money had and received. So, a sheriff, by seizing goods under an execution, has such a property in them, that he may maintain trespass or trover against the defendant, or a third person, for taking them away; but if they are afterwards sold or disposed of, without his concurrence, he is not bound to sue in either of these actions, but may waive the tort, and proceed in an action of assumpsit for money had and received to recover the produce of the sale. The only point on which I have entertained a doubt has been as to the right of the defendants to deduct the sum of 294*l.* 5*s.* 6*d.* paid by *Lyne*

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established by the common law, that a factor cannot pledge, and bind his principal by it. He may sell, and then his principal will be bound.

Mere possession of property will not pass the right to dispose of it as the factor pleases. He has a limited trust, which he cannot exceed to the prejudice of his principal. This was clearly a pledge, and the plaintiff is entitled to recover.

Mr. Justice BEST.—It would be destructive of all foreign commerce if we were not to give effect to the principle which has been decided in a great number of cases, that a factor cannot pledge. There appears to me to be no ground for supposing that the strict application of this rule will have the slightest effect in injuring the commerce of the country, by destroying the confidence subsisting between the foreign and *British* merchant, in the way in which the argument has been put at the bar. The *English* factor cannot be injured by common prudence; and I cannot see, why the foreign factor, who deals with the *English*

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and Co. to take up one of the bills drawn by the plaintiffs against the coffee, out of the sum originally advanced by the defendants. But it seems to me that this must fall within the general rule by which this case must be governed, viz. that *Lyne* and Co. had no authority from the plaintiffs to pledge the coffee consigned to them, but only to dispose of it by sale; the defendants therefore have no right to deduct that sum from the verdict, and the assignees of *Lyne* and Co. may carry it to the credit of their estate, on the settlement of account with the plaintiffs.

Judgment for the plaintiffs.

factor, should take umbrage at being asked, by what title he holds the goods. If the *English* factor would take the trouble to ask to see the letter which contains the invoice, he will know at once the situation in which the foreigner stands. In this case, if the defendants had done so, they would have seen that *Caumont* was a mere factor, and that he had no authority to pledge the goods of his principal, who was residing in *France*; and then they would very naturally have said, "We cannot lend you any money on these goods; your authority is limited; you have no authority to pledge." Where a man omits to take such cautionary steps, it would be contrary to the principles of common sense and of law, to allow him to retain what he ought to lose through his own imprudence. I cannot see any hardship in this at all. The hardship (if any) is all on one side, viz. that of the plaintiff; and with the consequences which may result to the defendants we have nothing to do. We must abide by the settled rule of law, that a factor cannot pledge the property of his principal.

Postea to the plaintiff.

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GRAY and Another v. BOND and Another.

Monday,
May 28.

THIS was an action on the case, for disturbing the plaintiffs in the enjoyment of their right of drawing nets to land, on the banks of the river *Derwent*, wherein they had a fishery.

Where the lessees of a fishery, had publicly landed their nets on certain parts of the bank of a river, for more than twenty years, and had occasionally sloped and levelled such landing places, although no evidence was offered at the trial to shew that the owner of the soil, or any person claiming under him, had any knowledge of the lessees landing their nets:—Held, that as such acts could scarcely have been exercised without such knowledge, it was properly left to the Jury to presume a grant of the right of landing nets to the lessees of the fishery, by some former owner of the soil.

The first count of the declaration stated, that before and at the time of the grievance, they were lawfully possessed of the manor of *Elvington*, in the county of *York*, and being so possessed, of right ought to have and use, by themselves, their farmers, &c. a certain several fishery in the river *Derwent*, at *Elvington*, on the *Elvington* side of the river, to the middle of the stream thereof, and also the liberty and privilege of drawing to land, and landing the nets used in the said fishery, at certain places on the banks of the said river, on the *Elvington* side thereof, called *Fellings*, and particularly at one such place, called the *Crabtree Felling*, otherwise the *Felling*, situate at *Elvington* aforesaid:—that the plaintiffs, being so possessed and entitled, ought to have had and enjoyed, and still ought to have and enjoy, the free and uninterrupted use, benefit, and advantage of the said fishery, and the said liberty and privilege, without any wilful interruption whatsoever:—Nevertheless, that the defendants, on, &c. wrongfully put, placed, and fixed, and caused, &c. divers piles, posts and stakes, in and across a certain recess or bay of the said river, on the *Elvington* side thereof, contiguous and opposite to one of the said places called *Fellings*, to wit, the said place called the *Crabtree Felling*, otherwise the *Felling*, and wrongfully kept and continued the same, so put, placed, and fixed as aforesaid, for a long space of time, to wit, &c. whereby the plaintiffs were prevented from fishing in a great part of their said fishery, and from drawing to land, and landing the nets at the said place

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called *Crabtree Felling*, otherwise the *Felling*, and from taking and catching so many salmon, and other fish, as during the said time they might have done, and could not use and enjoy their said fishery in so free, ample, and beneficial a manner as they of right ought to have done, and still ought to do.

The second count stated the fishery to be a free fishery.

The defendants pleaded Not Guilty.

The cause came on for trial before Mr. Justice *Bayley*, at *York*, at the Spring Assizes, 1820, when the Jury found a verdict for the plaintiffs, with nominal damages, subject to the opinion of the Court upon the following case:—

The river *Derwent* is a public navigable river, in the county of *York*, the tide whereof flows to a point higher up the river than the place mentioned in the declaration, called the *Crabtree Felling*.

This river forms the boundary of the manor of *Elvington*, which extends to the line of the stream, and the Lord of that manor, from time immemorial, hath been and is seised of a fishery in the river, on the *Elvington* side, to the mid-line of the stream thereof, and extending throughout the length of the manor, which he claims as appurtenant to it. Before, and at the time of the execution of the lease and release hereinafter mentioned, one *Richard Sterne* was seised in his demesne, as of fee, of and in the manor of *Elvington*, and of and in as well the lands conveyed by these deeds, as of other lands within the manor, and adjacent to the river *Derwent*, and being so seised, by indentures of lease and release, dated the 3rd and 4th *October*, 1774, he conveyed to *Ralph* and *John Dodsworth*, and to their heirs, (among other things), the close of land upon which the *Felling*, called the *Crabtree Felling*, is situate.

The plaintiffs are possessed, for a term of years, of the legal estate of and in the manor and fishery, and at the time

of the grievance complained of in the declaration were in possession of the fishery.

It was proved at the trial, that the owners of the fishery and their lessees, had, for above twenty years last past, and in the recollection of one witness, at the distance of sixty-four years ago, for the more convenient use and enjoyment of their fishery, drawn and pulled their nets to and upon the bank of the river, at certain different parts thereof, on the *Elvington* side, for the purpose of taking the fish out of the nets, and that they had occasionally dressed the landing places, by sloping the fore-shore, and levelling the ground. These landing-places are called "*pulls*" or "*fellings*," and are thirteen in number, within the manor of *Elvington*. The other fellings are situate upon different closes, which, before the time of the conveyance, were, and still are the property of the Lord of the manor of *Elvington*; but the *felling* in question, called the *Crabtree Felling*, is situate upon one of the closes which were conveyed to *Ralph* and *John Dodsworth* by the before mentioned deeds of lease and release, under whom, one *Mr. Preston*, the present proprietor of the closes, now claims, and who is seised of the same. There was no evidence either way, whether *Ralph* and *John Dodsworth*, or any person under whom *Mr. Preston* claims, or *Mr. Preston* himself, had any knowledge of, or was privy to the said use of the *Crabtree Felling*. The defendants, as the servants of *Mr. Preston*, and by his direction, before the commencement of this action, placed stakes in and upon the *Crabtree Felling*, so as thereby to prevent the plaintiffs from pulling their nets to land, or using the said *felling* so conveniently as before.

It was objected by the defendants, at the trial, that as the land upon which this *felling* was situate, had been conveyed by the owner of the fishery to the *Dodsworths*, in 1774, without any reservation or exception of the right of land-

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ing nets upon the said *felling*, such right was entirely gone.

The learned Judge left it to the Jury to presume, from the evidence of enjoyment, a grant of the right to land nets upon the *Crabtree Felling*, to the owners of the said fishery, by some former owner of the close whereupon it was situate, since the year 1774; and the Jury thereupon found a verdict for the plaintiffs—damages one shilling.

The question for the opinion of the Court was, whether the direction of the learned Judge was right?

If he ought to have directed the Jury to presume such grant, then the verdict was to stand;—if not, a nonsuit was to be entered.

The case came on for argument this day, when Mr. Serjt. *Bosanquet*, for the plaintiffs, submitted, that under the circumstances, the grant of the right in question ought to be presumed, and that it had been properly left to the Jury. The case of *Campbell v. Wilson* (a), appears to be decisive of the present, where an adverse enjoyment of a way over another person's land for above twenty years, was considered a strong ground for the Jury to presume a grant, although about twenty-six years ago, the way was extinguished by an award under an inclosure act. There, the result of the evidence was, that the occupiers of the defendant's close had always used the occupation way over the *locus in quo* for upwards of twenty years, and indeed before the making of the award, and that they had not used the way which had been set out for the defendant's estate by the award. The decisions on this subject are collected in a learned note by Mr. Serjt. *Williams*, to the case of *Yard v. Ford* (b), in which the principle is established, that uninterrupted enjoyment of an easement for twenty years, or upwards, is strong evidence of a right of enjoyment, from which Juries are di-

(a) 3 East, 294. — (b) 2 Wms. Saund. 175 (a), (b).

directed by the Courts to presume a grant, licence, or agreement. Here, there was no evidence that Mr. Preston, or any person under whom he claimed, had any knowledge of the exercise of the right in question. Whether they had or not, was a question for the Jury, and from the evidence as to the enjoyment, they were warranted in presuming a grant or conveyance to the plaintiffs, of the right to land nets upon the felling in question.

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Mr. Serjt. Hullock for the defendants.—The cases and principle relied on for the plaintiffs are inapplicable to the present question. The only point is, whether the facts, as stated in this case, warranted the Jury to draw the conclusion they did. Mere lapse of time, unassisted by intervening circumstances, is not of itself sufficient to afford a presumption of a grant, as against the owner of the soil. In *Campbell v. Wilson*, there was an *adverse user* of the way for more than twenty years, which having been notoriously exercised for so long a period, a grant might fairly be presumed, and which, coupled with the whole of the evidence in that case, fully warranted such a presumption. So, in all the cases collected by Mr. Serjt. Williams, in his note to *Yard v. Ford*, and particularly that of *Darwin v. Upton (a)*, the grounds for such presumption were infinitely stronger than in the present. There, it appeared, that in an action on the case for obstructing the plaintiff's lights, he had an uninterrupted possession of them, with the *acquiescence* of the defendant, for more than twenty years. Here, there was no evidence of acquiescence or knowledge by Mr. Preston, or any person under whom he claims, of the landing of nets by the plaintiffs, and therefore the mere usage for twenty years was not of itself evidence from which such a right might be presumed. In the late case of *Doe, d. Putland v. Hilder (b)*, Lord Chief Justice Abbott, in delivering the judgment of the Court, said; "One of the general grounds of a presumption

(a) 2 Wms. Saund. 175 (c).—(b) 2 Barn. & Ald. 791.

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the question is, whether the learned Judge who tried the cause, properly left it to them to presume a former grant. I agree with my Brother *Hullock*, that mere lapse of time, unaccompanied by other circumstances, will not raise the presumption of a grant against the owner of the inheritance. When lapse of time may operate as a bar, or raise such a presumption, the inference must also be drawn from accompanying facts, and therefore evidence is admissible to repel such a presumption; but uninterrupted enjoyment for twenty years is strong evidence of a right of enjoyment until the contrary is proved. This, however, depends on the facts of each particular case, and here, as there was no direct evidence given at the trial, whether the owner of the soil, or any person claiming under him, had any knowledge of, or was privy to the use of the felling in question by the lessees of the fishery, the inference to be drawn must depend on whether such use was exercised with the assent of the owner or not. Presumption in favour of a grant is more or less likely to be true, according as it is more or less probable, that the circumstances would not have existed, unless the fact, which is inferred from them, had also existed: and a presumption can only be relied on until the contrary is actually proved; and, if circumstantial evidence be such as may afford a fair and reasonable presumption of the facts to be tried, it is to be received and left to the consideration of the Jury, to whom alone it belongs to determine upon the precise force and effect of the circumstances proved. That has been done in the present case. If there had been no evidence whatever to raise the presumption of a grant against the owner of the soil, without his knowledge, or acquiescence of any thing that had passed, the argument which has been urged on the part of the defendants might apply: And although there was no evidence either way, that the proprietor of the land, or any person under whom he claimed, was privy to the use of the felling by the lessees of the fishery, still, the circumstances, as proved, were sufficient to leave to a

Jury, from which such knowledge and acquiescence might be fairly presumed. The inference to raise such a presumption was exceedingly strong, as the owner of the *locus in quo* was proved to have been some time in possession of the property: that the lessees of the fishery had lauded their nets openly on the bank of the river for the last twenty years, and in the recollection of one witness at the distance of sixty-four years ago, as well as having exercised other acts of ownership by levelling the ground and sloping the fore shore. I therefore think it may fairly be inferred that the possession from which a party would presume a grant of the easement was with the knowledge of the owner of the soil. At all events, from the circumstances, as proved, the Jury might properly infer such knowledge and assent; and I am therefore of opinion that it was most properly left to them to presume, from the evidence of the enjoyment, a grant of the right to land nets upon the felling in question to the owners of the fishery, by some former owner of the close whereon it is situate, since the year 1774, and consequently that the verdict found for the plaintiffs ought not to be disturbed.

Mr. Justice PARK.—The question in this case is not whether the verdict of the Jury be right or not, but, whether the learned Judge was right in leaving it to them to presume a grant or not; and I am of opinion that it was most properly left to them so to consider; and that the fact which was left to them is not controlled by the verdict which they have pronounced. Notwithstanding the distinctions which have been attempted to be drawn in the argument for the defendants, between this and other previous cases, I think that of *Campbell v. Wilson* is far stronger than the present. There, the way was extinguished by an award under an inclosure act which had been made twenty-six years before, and yet it was held, that an adverse enjoyment of the way for above twenty years, was a strong ground for the Jury to presume a grant; and it was there argued, that an uninterrupted and adverse

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enjoyment of a way for twenty years, was only evidence of a rightful commencement by grant, which was destroyed if it could be shewn to have originated in mistake: neither would a disuser by the defendant of his proper way, arising from a mistake, found the presumption of a release against him. There, too, the circumstances from which the knowledge of the owner of the soil might be inferred, were not so strong as in the present case; for here, the lessees of the fishery had openly and notoriously been in the habit of drawing their nets on the *locus in quo* for twenty, if not sixty-four years, and had also exercised other acts of ownership by sloping and levelling the ground, and it appeared they exercised those acts without impediment or interruption.

The case of *Daniel v. North* is distinguishable from the present, as there, the grant of a particular easement might be presumed, and the distinction was taken by Mr. Justice *Le Blanc* (a), who said that "presumptions are sometimes made against the owners of land, during the possession and by the acquiescence of their tenants, as in the instances of rights of way and of common; but that happens, because the tenant suffers an immediate and palpable injury to his own possession, and therefore is presumed to be upon the alert to guard the rights of his landlord as well as his own, and to make common cause with him; but the same cannot be said of lights put out by the neighbours of the tenant, in which he may probably take no concern, as he may have no immediate interest at stake." The possession of such an easement, therefore, would not affect the landlord on the determination of the lease. Here, although there was no direct proof that the owner of the soil knew of the use made of the felling in question by the lessees of the fishery, still, under the circumstances with which such use was made, there is reasonable ground to presume that he had such knowledge. I therefore think that the question was properly left to the Jury, and that they were warranted in drawing the conclusion they have done.

(a) 11 East, 375.

Mr. Justice BURROUGH.—Every case of this description must depend upon its own particular circumstances. Here, it appears that the plaintiffs had a several fishery, of which they were possessed for a term of years. Can it therefore, for a moment be presumed, that the proprietor of the close on which it was situate, could have been ignorant that it had been used by them for that purpose? They had been in the uninterrupted enjoyment of it, and particular spots were fixed at which they took the fish out of their nets, for the more convenient use of their fishery.—According to the testimony of one of the witnesses, every act done by them for the last sixty-four years, by sloping and levelling the ground of the *locus in quo* would have amounted to a trespass, unless they were entitled to do so for the purpose of landing their fish; and it appears that for considerably more than twenty years, those acts were exercised by them openly and publicly. The only question, therefore, is, whether there were any circumstances in the case from which the Judge might leave it to the Jury to presume a grant of the right in question. I am of opinion that there were, and that he was perfectly warranted in so doing, and that the Jury were not only justified in finding as they have, but that the use made by the plaintiffs of the felling was with the knowledge of the owner of the soil whereon it was situate, as they had occasionally exercised acts of ownership over it, and been in the constant usage of drawing their nets and landing their fish there without interruption.

Mr. Justice RICHARDSON.—This is not like the case where the possession, from which a party would presume a grant of an easement, was with the knowledge of the person seised of an estate of inheritance; nor is it similar to that of an injury arising to a landlord from the connivance or collusion of his tenant; for here, the question simply is, whether from the facts adduced at the trial, it was properly left to the Jury to presume a grant of the *locus in quo* by some

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former owners of the soil, to the lessees of the fishery, or not; and I think, taking all the circumstances into consideration, they were perfectly warranted in drawing the conclusion they have, as it might fairly be presumed that Mr. *Preston* had knowledge of the exercise by the plaintiffs of their drawing their nets and landing fish on the felling in question.

Judgment for the plaintiffs.

Monday,  
May 28.

## LUCKETT v. PLUMMER.

In a declaration of debt on a bail bond at the suit of the assignee of the sheriff, it was stated, that the plaintiff heretofore, to wit, on the 21st July, sued out of the Court of the Bench here, (the said Court being then and now at *Westminster*,) a writ of *capias ad respondendum*, by which *T. B.* was to answer the plaintiff in a plea of trespass; and also in a certain plea of trespass on the

case upon promises:—On special demurrer, assigning for causes, that the 21st July was a day in vacation, and on which no such Court then was at *Westminster*; and that the declaration only stated the writ to be to answer the plaintiff in a plea of trespass, instead of a plea “wherefore with force and arms, &c.”—Held, first, as the averment that the Court was sitting on a day in vacation, was laid under a *videlicet*, it might be treated as surplusage; and secondly, that it was unnecessary to set out or refer to the *clausum fregit* of the writ.

THIS was an action of debt on a bail bond brought by the plaintiff, as assignee of the sheriff of *Middlesex*, against the defendant as surety. The venue was laid in that county, and the declaration stated, that the plaintiff, heretofore, to wit, on the 21st July, in the first year of the reign of our Lord the now King, sued and prosecuted out of the Court of our said Lord the now King, of the Bench here, (the said Court being then and now at *Westminster*, in the said county of *Middlesex*,) a certain writ of our Lord the King, called a *capias ad respondendum*, directed to the said sheriff, by which said writ the said sheriff was commanded to take one *T. B.*, if he should be found in his bailiwick, and him safely keep, so that he might have his body before his Majesty’s Justices at *Westminster*, on the morrow of All Souls then next following, to answer the plaintiff in a plea of trespass, and also that the said *T. B.* might answer the plaintiff according to

to the custom of the Court of our Lord the King of Common Bench, in a certain plea of trespass on the case upon promises, to the damage of the plaintiff of 20*l.*, &c.—To this, the defendant demurred specially, and assigned for causes, that it is stated and alleged in the declaration, that the plaintiff on the 21st *July*, in the first year of the reign of our Lord the now King, sued and prosecuted out of the Court of our said Lord the now King of the Bench *here*, (the said Court being then and now at *Westminster*), a certain writ of our Lord the King, called a *capias ad respondendum*;—whereas, the said 21st *July*, in the first year of the reign aforesaid, was a day in vacation time, and on which day no such Court then was at *Westminster*; and that it is also stated in the declaration, that the said writ of *capias* was sued and prosecuted out of the Court of our Lord the now King of the Bench *here*, which said word “*here*” must be deemed to relate to and mean the county of *Middlesex*, the said county of *Middlesex* being the only place mentioned in the preceding part of the said declaration; whereas, the said writ ought to have been alleged to have been sued and prosecuted out of the Court of our Lord the King, before the right honourable Sir Robert Dallas, Knight, and his companions, then his Majesty’s Justices of the Bench at *Westminster*; and also that it does not appear against whom the said writ of *capias* was sued and prosecuted; and that it is stated in the said declaration, that the sheriff was commanded by the said writ of *capias* to take one *T. B.*, if he should be found in his bailiwick, and him safely keep, so that he might have his body before his Majesty’s Justices at *Westminster*, on the Morrow of All Souls then next following, to answer the plaintiff in a plea of trespass;—whereas, it ought to have been, to answer the plaintiff in a plea “wherefore with force and arms the close of the plaintiff at *Westminster* he broke, and other wrongs to him did, to the great damage of the plaintiff, and against the peace of our Lord the King.”

The plaintiff joined in demurrer.

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Mr. Serjt. *Taddy*, in support of the demurrer, submitted first, that as the word *then* referred to the 21st *July*, which was a day in vacation, the declaration was clearly demurrable, as the Court did not sit on that day, and he relied on the case of *Atkinson v. Anderson* (a), which was an action of debt on a bail bond, and the declaration stated, that the writ was sued out on the 2nd *November*, 1784, the Court *then* being held at *Westminster*, which, on special demurrer, was held ill. So, in *Estwick v. Cook* (b), it was alleged in a declaration on a bail bond, that the writ was sued out of the Court of *King's Bench*, then sitting at *Westminster*, on the 18th *July*, and it was objected that the writ was void, as it was not possible to have been sued out of that Court then sitting at *Westminster* on the 18th *July*, it being in the time of vacation; and the Court held the objection to be fatal, as the writ could not have been sued out on that day, when the Court could not nor did not sit out of Term. In *Harrington v. Taylor* (c), although that Court took notice in pleading of the issuing of a bill of *Middlesex* on a day in vacation, though it was not pleaded to have been then issued as of the preceding Term, yet, Mr. Justice *Bayley* there observed (d), "that in *Estwick v. Cook*, the allegation being that it issued on a day in the vacation, the said Court then being held at *Westminster*, was incongruous."

From *Greene v. Jones* (e), it seems, that an objection of this nature is fatal on special demurrer; and Mr. Serjt. *Williams*, in a note to that case, after taking a distinction as to the former authorities, observed, that "the subsequent cases shew that the Courts still hold this objection to be a valid one (f)."

Another objection is, that there is no reference in the declaration to the *clausum fregit* clause of the writ, as it only states the writ to be to answer the plaintiff in a plea of trespass on the case generally, instead of a plea "wherefore with force and arms the close of the plaintiff at *Westminster* he broke, &c." The place is material to shew the juris-

(a) 3 Term Rep. 184, (n).—(b) 2 Ld. Raym. 1557.  
(c) 15 East, 378.—(d) Id. 384.—(e) 1 Wms. Saund. 299 b.  
(f) See Id. 300 b. n. 7.

tion of the Court, and although it is not necessary to be proved, it must still be rightly set out in the declaration.

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Mr. Serjt. *Vaughan*, *contra*, was stopped by the Court.

Lord Chief Justice DALLAS.—I am clearly of opinion that there is no foundation whatever for either of these objections. The declaration is in substance sufficient, as it states that the writ was issued out of this Court. In *Atkinson v. Anderson*, the declaration stated, that the writ was sued out on the 2nd November, the Court then being held at *Westminster*. Here, however, it was stated under a *videlicet*. The precise day therefore is immaterial, and may be rejected as surplusage.

Mr. Justice PARK concurred.

Mr. Justice BURROUGH.—If the words “the said Court being then and now at *Westminster*” were rejected, the declaration would be sufficient. It is quite clear that writs may be sued out in vacation, and it does not matter when or where the Court sits, if it be not mentioned. The statutes (a) merely enact, “that the officer who shall sign any writ, shall, at the time of his signature, set down upon it the day and year of his signing,”—but the indorsement of the date is no part of the writ, and it is equally valid, whether it is sued out in Term or vacation.

Mr. Justice RICHARDSON.—This Court must sit at *Westminster*, and although it was stated in a parenthesis in the declaration, that it was *then* there, it may be wholly rejected as surplusage. But if it could not, as the day when the writ was issued was laid under a *videlicet*, it is immaterial and not required to be proved as laid. The statute 13 Car. 2. stat. 2. c. 2. s. 2. introduced a clause of *ac etiam*, in which the true

(a) 5 & 6 Will. & Mary, c. 21. s. 4. 9 & 10 Will. 3. c. 25. s. 42.

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cause of action must be expressed, but it is not necessary to load the declaration with stating the form of the original *clausum fregit*. The requiring the defendant to answer the plaintiff in a plea of trespass on the case, is sufficient, without setting out any further particulars.

Judgment for the plaintiff.

Monday,
 May 28.

HUDD v. RAVENOR.

To a cognizance for rent in arrear :—Plea in bar, that the defendant, on a former occasion, made a distress for the same rent, and took goods liable to distress, sufficient to discharge the rent in arrear and the costs of the distress, and might thereby have paid the arrears of rent, but neglected so to do, and wrongfully made a second distress for the same rent :—Held ill on special demurrer, assigning for cause that the plea did not shew that the rent was satisfied by the former distress.

THIS was an action of replevin for taking part of a rick of hay, and growing crops of beans and grass of the plaintiff. The defendant made cognizance as bailiff of one *Nathaniel Ravenor*, for half a year's rent due and in arrear to him from the plaintiff. Plea in bar, that before the said time when, &c. and after the rent in the cognizance mentioned, had become due, and whilst the same was in arrear and unpaid, to wit, on, &c. the defendant, as bailiff of *Ravenor*, entered upon the premises in which, &c. and seized and took as a distress for the rent in the cognizance mentioned, and certain other rent then due and in arrear from the plaintiff to *Ravenor*, for and in respect of the occupation by the plaintiff of the premises, in which, &c. as tenant thereof to *Ravenor*, certain goods and chattels then being in and upon the premises in which, &c. and liable to be taken as a distress for such rent, sufficient to pay and satisfy the whole of the rent in the cognizance mentioned, and the whole of the other rent, together with the costs and charges of the distress in the plea mentioned, and of the sale and appraisement thereof, and could and might have thereby levied the whole of the rent in the cognizance mentioned, and the whole of the other arrears of rent, together with the costs and charges of the distress, and of the sale and appraisement thereof, but neglected and omitted so to do ; and that the defendant, as bailiff of *Ravenor*, wrongfully and unlawfully, at the said time, when, &c. made a second distress, and took the goods in the declaration men-

tioned as a distress for the same identical arrears of rent, for which, with the other arrears of rent, the defendant, as bailiff of *Ravenor*, had so before seized and taken the other goods in the plea mentioned, and which were so sufficient to have satisfied the rent in the cognizance mentioned, and the other arrears of rent in the plea mentioned, and the costs and charges of the first distress, and of the sale and appraisement thereof, and unjustly detained the same against sureties and pledges, until, &c. in manner and form as the plaintiff has above complained against the defendant. And this, &c. Wherefore, &c.

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To this plea, there was a special demurrer, assigning for cause that it did not shew or aver that the rent was satisfied by the distress in the plea alleged to have been made by the defendant. The plaintiff joined in demurrer.

The cause now came on for argument, when

Mr. Serjt. *Vaughan*, in support of the demurrer, submitted, that the plea was no answer to the cognizance, as the plaintiff had not shewn or averred therein that the rent was satisfied by the first distress; and that in order to entitle himself to the return of the goods, he must shew a good title in *omnibus*. He relied on the cases of *Lingham v. Warren* (a), and *Lear v. Edmonds* (b), as being precisely in point, and by which the present must be governed.

Mr. Serjt. *Heywood*, *contra*, admitted, that those cases appeared to be against the plaintiff, but that neither of them were borne out either by principle or previous authority. This case, however, may be distinguished from both; that of *Lingham v. Warren*, was decided on the authority of *Lear v. Edmonds*, which was an action for use and occupation;—but the principle of satisfaction of the rent by the first distress is not the ground upon which that case can be maintained.

(a) Ante, vol. iv. 409.——(b) 1 Barn. & Ald. 157.



terms, still, the averments in the pleas, are different; for here, every suggestion as to the want of the sufficiency of the distress is excluded, as it is stated that the goods taken on the former occasion, and liable to distress, were sufficient to discharge the whole of the rent as well as the costs of the distress; and although the Court appeared to think that that case was not distinguishable from *Lear v. Edmonds*, still, the distinction turns on the different form of action; and, as here, the party distraining was bound to sell under the statute, it is enough to state that the first distress was sufficient to satisfy the rent and expences. If it is imperative on the party distraining to sell, no inconvenience is thereby imposed on the landlord, as the distress will in point of fact amount to a satisfaction, and the only consequence is, that he cannot distrain a second time. In *Gilbert on Distresses* (a), it is said, that "the lord's distress for rent, is in nature of a prerogative process to take the goods and chattels of his debtor in the first instance, without any summons; but such distress is not forfeited to the lord, if not replevied." A distress, therefore, is considered merely as a pledge, and the detention thereof is only justifiable as long as the duties incident to the tenure remain undischarged. If this were not so, a landlord might be an instrument of infinite vexation and trouble to his tenant, by continual distresses. At common law, a distress operates as a pledge only, and a second cannot be taken, if sufficient goods be on the premises to satisfy the first, or if the landlord has derived any benefit under it. Although the statute 17 Car. 2. c. 7. s. 4, provides for cases where a landlord might distrain again, yet, it is only for the residue of arrears, in case the value of the goods distrained be insufficient to satisfy the arrears of rent distrained for. That statute, therefore, recognizes the previous principle at common law, that a landlord cannot distrain a second time for the same rent, but must be driven to his action.

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(a) 4th Edition, by Impey, p. 18.

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In this case, the object of the distress was to obtain satisfaction of the rent due, which must depend on the sale of the goods distrained, and not on the mere taking. In *Mounsey v. Andrews*, it was stated that the property was detained, but here, it does not appear that the goods were kept, but only that they were taken, and it should have been added, that the rent was satisfied by such taking. The case of *Lear v. Edmonds* is expressly in point, and Lord Ellenborough there observed (a), that "the distress might enure as a satisfaction, or might constitute an injury, and that it was incomplete as satisfaction, by the mere act of seizure, and that if it amounted to such, the circumstances ought to have been pleaded, which would make it operate as a satisfaction." Here, it must be presumed, that the goods were not sold, or the rent satisfied; for, as Mr. Justice Bayley observed, in *Lear v. Edmonds* (b), "it is not averred that the goods distrained were sold, and it was the duty of the defendant in his plea to set out the whole of his case." Here too, there might have been an agreement between the parties that the distress might be withdrawn. At all events the case of *Lingham v. Warren*, is expressly in point, and decisive of the present question.

Lord Chief Justice DALLAS.—The only question is, whether the plea in bar in this case be good or bad, and to that point alone, I shall confine my opinion. The objection raised to it is, that it does not shew that the rent was satisfied by the former distress. Two cases have been lately decided, which shew that such a plea is bad for that reason. The first is that of *Lear v. Edmonds*, which was decided by the Court of King's Bench; and *Lingham v. Warren* rested on the authority of that case, as this Court considered it in principle to be undistinguishable from it. It now therefore remains to be considered whether *Lear v. Edmonds* was improperly decided or not, or whether the Judges of the former Court who determined it, have misconstrued the statute of Will. 4

(a) 1 Barn. & Ald. 158. — (b) Id. 159.

have twenty several executions sued out against him upon one judgment. These cases therefore, shew, that if a sheriff levies, and does not sell, the defendant is discharged, as the levy shall enure as a satisfaction. So, in *Oviat v. Vyner* (a), it was held, that if on a *fieri facias*, all the money is not levied, the writ must be returned before a second execution can be taken out, for that must be grounded on the first writ, and recite that all the money was not levied upon the first.

On these grounds, therefore, enough appears on the face of the plea, to shew, that the rent has been satisfied; for it is expressly averred, that the goods, at the time the defendant made the first distress, were sufficient to discharge the whole of the rent in arrear, as well as the costs of such distress. He had therefore no right to distrain a second time, as it was his duty to proceed to a sale under the first, by which he might have been fully satisfied.

Mr. Serjt. *Vaughan* in reply.—It was very properly observed by Mr. Justice *Bayley*, in *Lear v. Edmonds* (b), that the language of the statute 2 *Will. & Mary* was not imperative on the person distraining to sell the goods, still, however, it has been contended, that he is bound to do so after the distress is made. It is quite clear, that a landlord cannot split his rent, so as to enable him to make two distresses; but at common law, if the first distress be insufficient, he may re-enter. In *Bradby on Distresses* (c), it is said, that “at the common law, if the landlord made an insufficient distress when he might have taken more, a second distress for the remainder of the same rent was illegal, for it was his own folly not to have taken enough at first; but if it appeared that he could not find a sufficient distress on the land, then it seems, that even at the common law he might distrain again.”

(a) 1 Salk. 318. — (b) 1 Barn. & Ald. 159. — (c) Page 150.

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stated them in his plea, and as he has neglected to do so, it is not sufficient.

The cases of *Lear v. Edmonds*, and *Lingham v. Warren*, appear to me to be expressly in point, and even if there had been no decision on the subject, I should have entertained no doubt whatever but that it was necessary to state in the plea that the distress had operated as a satisfaction to discharge the rent due at the time it was taken.

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Mr. Justice PARK.—It was admitted by my Brother Heywood, in the outset of his argument, that the decisions of those cases appeared to be against the plaintiff. The present does not appear to me to be distinguishable from them in principle, and I think nothing further has been advanced in the course of the argument for the plaintiff to induce the Court to think that those decisions were wrong. It has been said, that it would be highly inconvenient to tenants if a second distress were allowed for the same rent, where sufficient property had been taken to discharge the rent in arrear under the first; but that inconvenience appears to me to be quite the other way, and if the rule were to prevail, that, when a distress is made, the landlord must proceed to sell, the tenant should at least shew how the distress ended, or that thereby the landlord had been satisfied his rent. In *Lingham v. Warren*, my Lord Chief Justice observed (a), “that there might be numerous instances where the merely taking a sufficient distress might not be productive of a satisfaction of the rent due.” For instance, a landlord may distrain, and a tenant may be seriously inconvenienced by allowing the distress to remain on the premises, and the former may agree to withdraw it, either on receiving a security, or relying on the word of the latter to pay the amount of the rent at a future period. It has been further insisted, that where the words “shall and may” are used in a statute, they must be construed as being imperative. To that posi-

(a) *Ante*, vol. iv. 412.

it might have easily been done. The plaintiff might have alleged that the defendant had wrongfully destroyed the goods distrained, or converted them, or fraudulently delivered them over to a third person after the distress. This case therefore rests on the same principle as those which have preceded it, and which appear to me to have been most properly decided; and as the plea does not shew that the rent was satisfied, or any cause equivalent to a satisfaction, I think it is bad, and consequently that the defendant is entitled to judgment.

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Mr. Justice RICHARDSON.—The only question is, whether the plea in bar discloses sufficient matter to answer the cognizance of the defendant. I think it does not, and more particularly so, as the two previous decisions have thrown an *onus* on the tenant to shew that the rent was satisfied. Here, the former distress might have been relinquished, and it is merely stated that the defendant neglected and omitted to discharge the rent and charges of the distress;—he might have neglected to do so by the solicitation of the tenant, and it does not appear to me that any issue could have been taken on the allegation in the plea as it now stands. It has been broadly contended, that the statute of *Will. & Mary* is compulsory on the landlord to sell. On that point, however, it is not necessary to give an opinion, but I am strongly inclined to think that it is not. Even if it were, it was never intended that the statute should preclude a landlord from putting an end to a distress by an agreement with his tenant, before the sale of the goods distrained. The principle in the cases of *Lear v. Edmonds*, and *Lingham v. Warren*, is applicable to, and decisive of the present, and therefore there must be

Judgment for the defendant.

1821.

Monday,  
May 28.

GATES and Others v. COLE.

To an action of covenant by tenants in common for not repairing a messuage:—  
Plea, that the lessee, after the demise to him and before the breach complained of, had purchased the interest of one of the lessors, whereby the lessee became tenant in common of the premises with the plaintiffs:—  
Held ill, on general demurrer, and that the action was properly brought.

THIS was an action of covenant. The declaration stated, that one *Ann Gates*, deceased, being seised of certain tenements in fee, by indenture of lease, dated the 12th *April*, 1797, and made between her of the one part, and the defendant of the other, she demised to him two undivided fourth parts, and also one undivided third part of another fourth part of a certain messuage situate at *Greenwich*, in the county of *Kent*:—to hold the same for twenty-one years, at the yearly rent of 9*l.* 6*s.* 8*d.*; and the defendant covenanted to repair the premises at his own expence, and leave them in a good state of repair at the end of the term. The declaration then stated the entry of the defendant, and that *Ann Gates* died seised of the premises, and intestate, leaving issue male (the plaintiffs) her co-heirs, according to the custom of gavelkind;—and assigned for breach, that the defendant did not repair according to the terms of the indenture. The defendant pleaded, first, *non est factum*. Secondly, that one *Bonner* was seised in his demesne as of fee, of and in one undivided fourth part and two undivided third parts of another fourth part of the premises in the declaration mentioned, and by reason thereof was tenant in common with the said *Ann Gates*, the lessor thereof; and that *Bonner* being so seised, afterwards, and after the making of the indenture of lease in the declaration mentioned, and long before the committing the supposed breaches of covenant therein also mentioned, to wit, on the 30th *August*, 1811, by a certain indenture of bargain and sale, made between him and the defendant, he, (*Bonner*) bargained and sold his said shares to the defendant, by virtue of which, and by force of the statute for transferring uses into possession, the defendant became seised of such shares in his demesne as of fee, and before and at the time of committing the supposed breach of covenant in the declara-

tion mentioned, was, and from thence hitherto hath been, and still is tenant in common of the premises with the plaintiffs. Thirdly, that before the breach complained of, the defendant was seised in fee in the residue of the premises; by reason whereof, he became tenant in common with the plaintiffs. There was a general demurrer to the second and last pleas, and the defendant joined in demurrer.

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v.  
COLL.

The cause now came on for argument, when

Mr. Serjt. *Onslow*, in support of the demurrer, submitted, that those pleas were no answer to the plaintiff's action, and that the only question was, whether, under the circumstances, as stated in the second, one tenant in common can sue his co-tenant in covenant, for not repairing?

In *Coke Littleton* (a) it is laid down, that one joint tenant may let his part for years or at will to his companion; and in *Bacon's Abridgment* (b) it is said, that if one joint tenant, or tenant in common, make a lease for years of his part to his companion, it is good; for this only gives him a right of taking the whole profits, when before he had but a right to a moiety thereof; and he may contract with his companion for that purpose as well as he may with any stranger. In *Snelgar v. Henston* (c), it was decided, that one tenant in common may distrain upon the other for rent, where he comes in under the lessee. If, therefore, one tenant in common may sue his co-tenant for rent, it is clear he may do so for not repairing according to his covenant; for, in *Coke Littleton* (d) it is said, that if two tenants in common, or joint tenants, be of an house or mill, and it fall in decay, and the one is willing to repair the same, and the other will not, he that is willing shall have a writ *de reparatione faciendâ*. Here, if there was no distinct covenant to repair, that writ might be obtained on the mere privity of estate;

(a) Page 186 a. — (b) Tit. Lease, (I). 5. — (c) Cro. Jac 611. (d) Page 200 b.

But the Court held, that the action was properly brought : that no objection had been raised on the face of the pleadings as to the custom of gavelkind—that it was stated in the declaration that *Ann Gates* died seised, whereby the plaintiffs became entitled as co-heirs. The defendant should have pleaded his willingness to do his part of the repairs. If he wished to avail himself of any objection as to the plaintiff's title, he should have demurred specially. This, therefore, must be considered, merely as a case between tenants in common, and not at all affected by the custom of gavelkind, and therefore there must be

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Judgment for the plaintiffs.

CARR, Plaintiff; PHILLIPS, Demandant; EVANS and  
WILLIAMS, Vouchers.

Wednesday,  
May 30.

MR. Serjt. *Lees* moved, that the appearance of the second vouches in this recovery might be now received and recorded, as if he had appeared in the last *Michaelmas* Term. He founded his motion on an affidavit, which stated that the deeds were completed, and that the first vouches appeared in that Term : that the other was obliged to leave this country for the South of *France*, on account of ill health, and had but lately returned. He referred to the case of *Wardale*, Demandant, *Bell*, Tenant, *Robinson* and others, Vouches (a), where a recovery, not having been completed in the Term in which it was intended, through the refusal of one of the vouches to accede to it; the Court permitted it to be done in a subsequent Term for the benefit of the other parties.

The Court permitted a recovery to be completed *non pro tunc*, which had been delayed in consequence of one of the vouches having left this country and resided abroad on account of ill health.

Fiat.

(a) 4 Taunt. 618.



For the defendant, it was proved, that he had been frequently warned off from sporting on the manor, by several occupiers within it, as the plaintiff had no power to grant him the exclusive privilege, he not being the owner of all the lands within the manor, nor had he a right of free warren. It was also proved that the defendant's principal inducement to take the farm, was the enjoyment of the privilege of sporting thereon. It was further given in evidence, that the plaintiff had not procured the glebe land as stipulated for, on account of which, he had offered to make a deduction of 15*l.* a-year from the rent.

The defendant then called witnesses to shew the actual value of the farm, without the privilege of sporting and the addition of the glebe land, and it was proved by several witnesses that 350*l.* was the adequate annual value without them, which sum the defendant had paid into Court.—He at first objected to the agreement's being given in evidence; but his Lordship was of opinion that the plaintiff was entitled to use it as evidence of the *quantum* of damages to be recovered under the statute 11 *Geo. 2. c. 19. s. 14. (a)*. On the other hand, the plaintiff opposed the calling witnesses for the defendant, to shew the value of the farm without the privilege of sporting, on the ground; that the agreement entered into was a consummated parol demise, and that there had been no eviction; but his Lordship admitted this evidence also:—on which the Jury, considering 350*l.* to be the annual value of the land, found a verdict for

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(a) By which, to obviate some difficulties that many times occur in the recovery of rents, where the demises are not by deed, it was enacted, that from the 24th June, 1738, it should and might be lawful to and for the landlord, where the agreement is not by deed, to recover a reasonable satisfaction for the lands held or occupied by the defendant in an action on the case, for the use and occupation of what was so held or enjoyed; and if in evidence on the trial of such action, any parol demise or any agreement, (not being by deed) whereon a certain rent was reserved, shall appear, the plaintiff in such action shall not therefore be nonsuited, but may make use thereof as an evidence of the *quantum* of damages to be recovered.

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the defendant. His Lordship, however, reserved the question for the opinion of the Court, whether this evidence was admissible or not: if it was, the verdict was to stand; if not, it was to be entered for the plaintiff for the full amount of the rent as stipulated for by the agreement.

Mr. Serjt. *Faughan*, on a former day in this Term, had obtained a rule *nisi* that this verdict might be set aside, and instead thereof that a verdict might be entered for the plaintiff, or that a new trial might be granted, on the ground that the defendant ought not to have been permitted to have gone into evidence as to the real value of the farm, as he had taken possession under the agreement, which was binding on him under the statute 11 Geo. 2. c. 19. s. 14. as to the *quantum* of rent he therein stipulated to pay, and that the value of the farm being thereby ascertained, the Jury were not at liberty to find any value *dehors* the agreement. He referred to the case of *Baker v. Holtzaffell* (a), where it was determined, that a landlord of a house, demised under a written agreement, might recover against his tenant in an action for use and occupation, the rent accruing after the premises were burnt down, and no longer inhabited by the tenant; and Lord Chief Justice *Mansfield* there said, that "the land was still in existence, and there was no offer on the part of the defendant to deliver it up, and that he might have re-built if he had pleased." Here, the agreement is of itself conclusive evidence of the terms under which the defendant occupied the premises, and the amount of the rent to be paid to the plaintiff for the same.

Mr. Serjt. *Pell* now shewed cause, and submitted that the agreement was not binding on the defendant, unless the plaintiff had shewn at the trial that he had had the whole benefit of the property intended to be demised, and therefore, that it

(a) 4 Taunt. 45.

could only be used as evidence of the *quantum* of damages to be recovered; and as the plaintiff was only entitled to a reasonable satisfaction for the lands actually held and enjoyed by the defendant, the Jury were authorized to decide what their real value was. The defendant had never signed or executed the agreement, and it was clearly proved that he had not had the privilege of sporting, to which he was to be entitled, and without which, he would not have taken the farm. Besides, it was given in evidence, that the plaintiff offered to make an abatement from the amount of the rent claimed, in consequence of his having failed to procure the additional glebe land. The defendant, therefore, ought not to be precluded from shewing that the plaintiff had no right to claim the full amount of the rent according to the stipulation contained in the agreement, as he had failed to perform the most material part of it; and as the defendant was entirely deprived of the privileges intended to be conferred on him, it was, at all events, in the nature of an eviction as to part, and as the Jury have ascertained the value of the land by their verdict, it cannot be disturbed.

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Mr. Serjt. *Vaughan* and Mr. Serjt. *Taddy*, in support of the rule, contended, that the plaintiff was, at all events, entitled to a new trial, as the defendant had recognized and admitted the terms contained in the agreement, after it had been reduced into writing, and by taking possession, and deriving a benefit under it. He was therefore bound by it, although he had not signed it. In *Coke Littleton* (a) it is said, that if an estate be made by indenture to one for life, remainder to another in fee, upon a certain condition, albeit, he in remainder be no party to the indenture, (the parties thereunto only being the lessor and the tenant for life) yet, when he in remainder entereth and agreeth to have the lands by force of the indenture, he is bound to perform the conditions contained therein.

(a) Page.231 a.

fere in the enjoyment of that privilege, during the time the defendant occupied under him. The rule of law is perfectly clear, that where a party has agreed to pay a specified rent, it is incumbent on him to satisfy it; and if there be any complaint against the person entitled to receive it, the only remedy is by bringing a cross action.

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Lord Chief Justice DALLAS.—With respect to the justice of this case, I entertain no doubt whatever. It is not for me now to say, whether the plaintiff, at the time he entered into the agreement with the defendant, by which he engaged that the latter should be entitled to the exclusive right of sporting over the manor, knew whether he was entitled to grant such right or not; but the question is, whether he has not stipulated for more than he was empowered to grant. The outline of the facts, as produced in evidence, were these: it appeared that the defendant was extremely fond of sporting, and that his chief inducement to take the farm, was, that a proviso should be inserted in the lease, by which he was to be entitled to the exclusive privilege of sporting, with the exception of the plaintiff and his friends; that such was his intention, is manifest on the face of the agreement under which the plaintiff sought to recover in the present action. It turned out however, that the defendant was interrupted in the enjoyment of his sport, and that the plaintiff had no right to grant him this privilege; and, in point of fact, he was entirely deprived of such right. The agreement must be taken altogether, or not at all; and can it be contended that the plaintiff has a right to recover from the defendant the full value of the land, as if he had enjoyed the whole benefit intended to be given to him by the deputation and use of the glebe land; and more particularly, when it was proved that the plaintiff himself had actually offered to deduct 15*l. per annum* from the rent on account of the latter? It must be recollected, that this is an action for use and occupation, in which the plaintiff is

Suppose he had agreed to let ten closes to the defendant, and he had taken possession, and after having occupied for some time, he discovered that the plaintiff was only entitled to let three of them, can it be said that he would be bound to pay, as though he had enjoyed the whole number, which were expressed to be let to him by the agreement? It has been said, that the plaintiff has been surprised by the evidence adduced at the trial, but it was proved that he had offered to deduct 15*l.* a year from the rent: he must therefore have been aware, not only that the defendant objected to pay the sum originally agreed on, but also the ground of such objection. He should therefore have shewn that the value of the land was equal to the amount of the rent stipulated for in the agreement, whether the defendant had enjoyed the privilege of sporting or not; and as he has failed to do so, I think the Jury were perfectly warranted in finding the annual value according to the estimation of the witnesses called for the defendant at the trial.

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Mr. Justice BURROUGH.—It is a mistake to suppose that the defendant was merely to have the deputation from the plaintiff as Lord of the manor, as he agreed that he should have the exclusive right of sporting over the manor within which the farm lay.

Lords of manors frequently reserve a right to themselves to sport over the lands of their tenants and others who occupy within the manor. The plaintiff might have had a right of this description, and if so, it is quite clear that he would have transferred it to the defendant. It must be observed, that the instrument in question is a mere agreement for a lease, which was to contain a proviso, giving the defendant an exclusive right of sporting. This it appears he has never enjoyed. Can it therefore be said that he is bound to pay the whole of the rent as stipulated for in the agreement, when the plaintiff has failed to perform his part of it, as to the material object which the defendant had in view? His agree-

The plaintiff must have applied to the defendant for rent before he commenced the present action, and the defendant might have refused to satisfy it, as he had been deprived of the liberty of sporting, which was embraced in the agreement. It has been said however, that the plaintiff was taken by surprise at the trial, but it was proved, that he had agreed to make a deduction from the rent of 15*l. per annum*. This, therefore, amounts to a recognition by him of the ground on which such deduction was sought. At all events, it cannot tend to prejudice the defendant, who was altogether deprived of his privilege of sporting, which it must be presumed the plaintiff was perfectly aware of before he brought this action, whereby he sought to recover, as if the defendant had enjoyed all the rights and privileges agreed to be granted to him, to their fullest extent.

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Rule discharged.

DUNCAN v. SAMUEL HILL, RICHARD HILL, WRIGHT,  
and MAINWARING.

Saturday,  
June 2.

THIS cause was tried before Lord Chief Justice *Dallas*, at *Guildhall*, at the Sittings after the last Term, when the Jury found a verdict for the defendants.

Mr. Serjt. *Lens*, on a former day in this Term, had obtained a rule *nisi*, that such verdict might be set aside, and a new trial granted, on the ground, that two bills of exchange offered in evidence by the plaintiff had been improperly rejected.

Where the plaintiff declared on three bills of exchange, as distinct causes of action, in three several counts, but by his particular of demand confined his right to recover on the bill set forth in the first count only,—

and the defence was, that the defendants were not partners when that bill was drawn, and the plaintiff offered in evidence the two other bills of a subsequent date, but drawn at the same place as the former, for the purpose of shewing a continuing partnership, which were rejected, on the ground that they were not included in the particular—the Court granted a new trial.

it is said they were offered in evidence was this:—The defence set up, was, that *Wright* and *Mainwaring*, who had originally been partners in a stone-pipe company, on whose account these bills were stated to have been drawn, had ceased to be so, or were not proved to be such, when the first bill was drawn, and that *Samuel Hill* and Co. was the firm of the house of the two *Hills*, carrying on, as wine merchants, a separate trade, to which character these bills might be referred; and to rebut this defence, these two bills were alleged to have been offered in evidence, to shew a continuation of the partnership at and subsequent to the time when the first bill for 1200*l.* was drawn,—the two latter bills being of a subsequent date, and drawn at the same place with the former bill, where the business of the stone-pipe company was carried on. It has been stated for the defendants, that the two bills were only offered in evidence in support of the counts in which they are stated as substantive causes of action; and it is agreed on both sides, that if so offered, they were properly excluded. But the fact has been correctly stated on the part of the plaintiff, namely, that they were offered as auxiliary evidence only, and in the manner I have stated; and it is equally true, that so offered, I did not receive them, considering them as excluded by the particular as framed, and therefore objected to by the defendants. I thought that the plaintiff having expressly declared on three bills, but by his particular, having confined his right to recover to one bill only, the defendants had no reason to apprehend that the two bills would be given collaterally in proof, under the general notice, but that, by all the other counts, was to be understood the common counts, as in the usual way. Supposing no counts had been on the two bills specifically, I should have had no doubt but that they might have been received as auxiliary evidence under the common counts; but the peculiarity consisted, in their having been originally declared on as distinct and substantive causes of action, and by the particular,

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abandoned as such. My Brothers, however, are of opinion, that under this particular, the plaintiff had a right so to apply the two bills, and with this opinion, on final consideration, I agree; and the more especially for this reason, that it appears to me, that I ought at all events to have received the bills in evidence. If admitted, and they had weighed nothing, they would then have left the case where it was, and if they had weighed any thing, the defendants might have moved the Court, on an affidavit, stating, that they had been misled by the particular as framed, in which case the sufficiency of the particular would have been before the Court, and if at all doubtful, the defendants would have been let in to try. But, taking it the other way, were a plaintiff to be shut out by a strict construction, he might be concluded by a particular fairly meant, but doubtfully worded, and framed against the justice of his case. At any rate, there can be no mistake, nor any surprise on the defendants in future, as what has passed, and is now passing, will operate as the fullest notice how the bills are to be applied. I have said thus much, in a case that would not have required it, had there not been a difference of opinion with respect to facts asserted at the bar, and therefore, with a view to a future trial, it is important that the parties should clearly know what is understood to have passed on the former occasion, and on what ground a new trial is now granted. The rule, therefore, must be made

Absolute.

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ENDERBY v. GILPIN.

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THIS was an action of covenant. The declaration stated, that by an indenture, dated the 24th *September*, 1807, and made between the defendant, of the one part, and the plaintiff, of the other, whereby, after reciting that they had agreed to become partners in the trade or business of an army clothier, army agent, and woollen draper, then carried on by the defendant:—it was witnessed, that in consideration of the mutual trust and confidence which the defendant and plaintiff reposed in each other, and in consideration of the covenants and agreements in the said indenture after contained, to be entered into by them mutually and reciprocally with each other, each of them, the defendant and the plaintiff, did by that indenture, covenant with the other of them in manner following: *viz.* that they, the defendant and the plaintiff, should become partners in the business of an army clothier for the term of ten years from the day of the date of the indenture; that the plaintiff should advance 20,000*l.* as part of the capital, for carrying on the business; and that the plaintiff having accordingly advanced the sum of 20,000*l.* immediately before the execution of the indenture, the residue of the capital should be provided by the defendant, or

The plaintiff and defendant covenanted by deed to become partners] in the business of army clothiers, for ten years, and that the plaintiff should advance 20,000*l.* as part of the capital for carrying on the business, and that the defendant should provide a like sum; that the plaintiff, during the continuance of the partnership, should receive out of the profits, if they were adequate, or if not, out of the capital, 2000*l.* per annum for his share of the profits; that he should not be answerable for any losses

or expences incident to the concern, and that the business should be carried on in the name of the defendant alone. The defendant then covenanted, that on the determination of the partnership by effluxion of time, the sum of 20,000*l.* should be repaid to the plaintiff by instalments, at three months date, bearing legal interest, to be computed at the termination of the partnership; and if default was made in the annual payment of 2000*l.*, or the joint capital was at any time reduced to 20,000*l.*, then the plaintiff should be at liberty to terminate the partnership, and repay himself the 20,000*l.* advanced immediately; and the defendant was to guaranty all debts, and pay all losses. In an action of covenant brought by the plaintiff, to recover the 20,000*l.*, at the expiration of the ten years, the defendant pleaded that the deed was executed by way of shift, in pursuance of an usurious contract;—which plea, upon issue joined, was negatived by the verdict of the Jury:—Held, that after that finding, the deed must be taken to disclose the real intention of the parties, and that upon the face of it the plaintiff and defendant must be deemed partners, and that it was not void as being a loan of money within the meaning of the statute of usury; and the Court refused to grant a new trial, or arrest the judgment.

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by him and such additional partner as in the said indenture mentioned, and should be equal to at least, 20,000*l.*; and further, that during the continuance of the partnership, the plaintiff should be entitled to have out of the profits of the trade, (and in case of any deficiency therein, then out of the capital thereof), by half-yearly portions, on certain days in each year, a certain sum of money therein mentioned, to wit, 2000*l. per annum*, as and for his full dividend or share of the profits or produce of the said trade; and that all the residue of the profits of the trade, in each half-year during the partnership, should, on the days in that behalf mentioned, and also on the determination of the partnership, belong to, and be the sole property of, and be had, received, and taken by the defendant, as and for his share of the profits of the partnership. And the defendant, by the said indenture, further covenanted with the plaintiff, that on the determination of the partnership by effluxion of time, the said sum of 20,000*l.* should be repaid to the plaintiff, his executors, &c. by six equal instalments, to be computed from the determination of the partnership, and each instalment to be paid at the end of each three calendar months, and interest, at the rate of 5*l. per cent.* to be computed from the determination of the partnership.

The declaration then alleged a breach of covenant by the defendant in the non-payment of the capital sum of 20,000*l.*, together with 3000*l.* for interest, due on the expiration of the partnership, according to the terms of the indenture.

The defendant craved oyer of the deed, which was set out, and contained the following covenants, besides those stated in the declaration: *viz.* that the business should be carried on in the name of the defendant only, or in the names of him and another person who should be admitted into the partnership, pursuant to the provisions for that purpose contained in the deed; and that it should be under the sole direction and controul of the defendant, or such other partner; and that the defendant and such partner,

should undertake the management of the business, without any compensation to be made to them on that account; that the defendant should hire servants, and pay their wages out of the profits of the business; that he should keep the books of accounts, which should be open to the inspection of the plaintiff, and that he should once every year deliver a balance-sheet to him; that all debts and expences contracted in the trade, and all losses, either by bad debts, decay of goods, suits, or other casualties, and all servants' wages, and other necessary expences, and the property tax, payable in respect of the profits, should be paid out of the partnership stock and effects, including the sum of 20,000*l.*; that the defendant should pay out of the stock or capital of the partnership, all such losses as should from time to time arise in carrying on the business, and guaranty the payment of all debts which should be due to the partnership; that neither of the parties should become surety during the continuance of the partnership, or compound or release debts, &c.; that in case the defendant should die at any time before the expiration of ten years, and his executors should refuse to carry on the partnership, they should have power to determine it, on giving three months notice to the plaintiff, and on paying out of the partnership money and effects, the sum of 20,000*l.* advanced by him to the capital of the partnership, and such further sum as should be a proportional part of the sum of 2000*l.*, for the plaintiff's share of the profits; that on the determination of the partnership by effluxion of time, in case it should so determine, a sufficient part of all the debts due or owing to the partnership, should be fully repaid to the plaintiff, by six equal instalments, to be computed from the determination of the partnership; that in case at any time during the partnership, the value of the partnership effects should be reduced to the sum of 20,000*l.*, or in case either of the parties should become bankrupt, or depart the realm, or do several other acts therein named, it should be lawful to determine the

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corrupt and unlawful agreement, and for the purpose aforesaid. And the defendant further averred, that the said sum of 2000*l.* so to be paid yearly, by such half-yearly portions as aforesaid, for the loan of the said 20,000*l.*, exceeded the rate of 5*l. per cent.* for one year, contrary to the form of the statute, whereby the said indenture was and is wholly void in law; And this, &c. Wherefore, &c. There were five other pleas, varying the terms on which the money was to be advanced.

Replication, that the plaintiff and defendant executed the indenture in the declaration mentioned, for good and lawful considerations, and not by way of shift, or in pursuance of, or upon the said corrupt and unlawful agreement, or for the purpose in the said pleas of the defendant mentioned, in manner and form as he hath in those pleas in that behalf alleged; on all of which issue was joined.

The action was directed by the Vice Chancellor, to try whether the deed entered into between the plaintiff and defendant, constituted a *bonâ fide* partnership, or whether the transaction was a mere loan of 20,000*l.* at 10*l. per cent.* under cover of a fictitious partnership, with a view to avoid the penalties attached to the offence of usury? An issue had been previously directed by his Honour, to ascertain the same question, which was tried before Mr. Justice *Park*, at the Sittings at *Guildhall*, after *Trinity Term*, 1820, in which the plaintiff recovered a verdict, with one shilling damages, thereby establishing the partnership and negating the usury. The defendants in that issue, who are the assignees of the present defendant, and who are also the real defendants in this action, not being satisfied with that verdict, applied by motion to the Vice Chancellor for a new trial, which was in effect granted, the form of action being changed; the plaintiff being directed to bring an action on the covenant set forth in the deed, for re-payment of the 20,000*l.* the assignees defending the same in the name of *Gilpin*, by pleading usury, and not setting up the bankruptcy, and giving liberty

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ship, to avoid the statute of usury, but that it was a real and *bond fide* partnership, and which must be taken as forming part of the facts appearing on the record, they have thereby negatived every idea of a loan of money founded upon an usurious consideration.

It has been said, that the deed *per se*, imports usury on the face of it, but it cannot now be looked at alone, as the defendant might have demurred, when every consideration might have been derived from it as a matter of fact. From that, however, he is now excluded, because it has been expressly found, that usury, which was inferred, constituted no part of the consideration on which it was founded. If, therefore, the statute of usury has no application to the present question, there is nothing in the deed which makes it in itself illegal. It is not an unfair bargain, nor does the plaintiff derive a greater benefit under it than the law would give him by a common contract. If there be a *bond fide* partnership in fact, a Court of law will not consider whether it is an advantageous or hard bargain on the one side, or not; because it must be inferred, that the party contracting was fully aware of all the circumstances attending the transaction before he entered into it, and therefore, unless fraud can be shewn, the deed must be considered as valid, and must prevail in law, and the only remedy, if the bargain was unconscientious, is in a Court of Equity. If this had been a mere forbearance of money, at more than 5*l.* *per cent.* it would constitute an usurious contract, but, on the contrary, it has been found to be a *bond fide* partnership. The law has not defined what is the fair share of profits arising from a partnership between one partner and another; and the mere reservation of profit out of a partnership concern, without risk to the person who advances a capital, is not usurious. It has been objected as to this being a partnership, that the plaintiff's name was not to appear in the books of account, nor was he to attend at the office where the partnership business was transacted, but the very object of rendering him a dormant

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ject of the parties was not a partnership; but here it has not only been found as a fact, but appears on the record, that there was no loan, device, nor contrivance to make an apparent partnership answer the purposes of a real one. It has never been decided, that where a person becomes a partner, and is responsible as such to the creditors of the firm, he can, from any profits made, or a division of such profits be brought within the scope of the statute of usury, or that any legal objection can be taken to such a contract being entered into, although he may receive more than 5*l.* *per cent.* on the capital originally advanced by him. If the obligation or liability of a partner be restrained to a precise sum, it may be said, that he is not responsible to the full extent, but where he is not so limited, but becomes a partner to all intents to the full amount of the property, and is liable to the payment of all the debts, as in this case, all idea of usury must be negatived, as well as that the partnership was framed with a contrivance to cover the sum advanced. If a party risks his money, and makes himself liable to all the creditors of the partnership, and if instead of coming to an arrangement as partners in the ordinary manner, *viz.* by a communion of profit and loss, he is contented to accept a small share of the profits, and to forego the probability of there being a much larger proportion, it will not make the contract usurious or illegal. Here, although the plaintiff had not a full share of the profits, he had an indemnity of another description, *viz.* in the event of the trades' not proving successful, or if there should happen to be an insolvency, he had his capital to resort to, out of which, he was to be supplied 2000*l.* a-year, and in the event of the profits falling short, he had the personal security of his partner for the sum advanced by him at the time of entering into the partnership. It does not follow that there must be a community of profit and loss, or because the profits and losses are not shared equally, it is not sufficient to constitute a partnership, for if a partner shares at all in

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them, he is equally a partner, as a joint responsibility is alone sufficient, without reference to the extent or division of such profits. In *Barclay v. Walsley* (a), Lord Ellenborough said, that "to constitute usury there must either be a direct loan and a taking of more than legal interest for the forbearance of re-payment, or there must be some device contrived for the purpose of concealing or evading the appearance of a loan and forbearance, when in truth it was such. But that in that case, there was no loan or forbearance, only a mere anticipation of the payment of a debt by the party before the time, when by law he could be called upon for it." So, here, there was not only no direct loan, but it has been found that there was not even a contrivance to cover a loan or forbearance. All the clauses in the deed shew that there was no latent intention, but that a *bona fide* partnership was to be entered into between the parties. The case of *Doe, d. Metcalf v. Brown* (b) is extremely strong, to shew, that although parties may have acquired a very large profit beyond 5l. per cent. yet, if there be no loan it will not constitute usury. There, A. in consideration of a certain sum of money, conveyed premises to B.; and, at the same time, an agreement was entered into between them, that A. should re-purchase the same premises, within fifteen months, at a considerable advance upon the original purchase-money; and B. agreed to sell and re-convey at such advance; and it was held, that such a contract in point of law was not usurious: and Lord Chief Justice Gibbs there said (c), "the deeds on the outside have the appearance and character of absolute conveyances; they give no intimation of a loan. The defendants contended (observed his Lordship), that they were mere machinery for the advance of money, and that, although they have the form and complexion of a sale, they are in fact mortgages, and that the sole design of the parties was a loan of money; A. not intending to part with the pre-


(a) 4 East, 57. — (b) 1 Holt N. P. Rep. 295. — (c) Id. 297.

misses, and B. not contemplating a purchase. With respect to the objection to the contract between A. and B., that the former should re-purchase, and the latter re-convey by a given day, I am of opinion that that is not usury. A. sold for 1,200*l.*, and was to re-purchase at a large advance that was a circumstance to raise a suspicion whether the whole transaction was not colourable; but it was not an usurious contract upon that account merely. If a sale were intended, it was a valid contract: if nothing were meant but a loan of money, it is void. The question was, whether it were a loan, or a sale of the premises? The agreement by A. to re-purchase at all events for 1,400*l.* looked like a loan, but it was a question for the Jury as to the real intention of the parties." So, here, there was a covenant by which the re-payment of the plaintiff's capital was guaranteed, which if it were a loan, would make it usury. Still, the whole question reverts back to whether it were a loan or not; if it were not, that ingredient would not affect the case, and it has been found that it was not a loan, but only an advance of money for the purpose of carrying on the trade. This therefore was at all events a partnership for ten years, and the money advanced could not become a loan until the expiration of that period. For these reasons, therefore, there is no valid ground either for a new trial, or that the judgment should be arrested.

Mr. Serjt. *Vaughan* and Mr. Serjt. *Pell*, in support of the rule.—The question in this case, turns on the construction of the deed to be taken *per se*, and whether it must not of necessity be considered on the face of it to be a loan, and not a partnership, and if the former, with usurious interest, which is prohibited by the statute of usury. The deed does nothing more than embody the antecedent agreement, and is in fact the sole contract entered into between the parties, and must be considered without any evidence extrinsic to it, for if there be one principle of law more clear than another,

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year. That is a direct declaration that any contract for a loan of money or otherwise, at a higher interest than *5l. per cent.* is usury. It then provides, that all bonds and contracts whatever, for the payment of any principal, or money to be lent, or covenanted to be performed, upon or for any usury, whereupon or whereby there shall be reserved or taken above the rate of *5l.* in the *100l.* shall be utterly void. On the construction of that clause of the statute, the deed in question is an assurance for the payment of money to be lent, whereby there is to be received more than *5l. per cent.* in the *100l.* The third provision is, that if any person shall upon any contract, take and receive, by way of any corrupt bargain, loan, &c. or by any deceitful means, for the forbearing or giving day of payment for one whole year, for money above the sum of *5l.* for the forbearing of *100l.* for a year; such person shall forfeit for every such offence treble the value of the monies so lent. It is true, that if a party proceeds for that penalty, it is necessary for him to come directly within the terms of that branch of the statute, enabling him so to do; and if to the second, it be pleaded that there was an assurance, whereby a party covenanted to pay at the rate of more than *5l. per cent.* it would be a good bar to the action. It has been said, that in order to constitute usury, it must appear distinctly on the record; and here, it is quite apparent on the face of the instrument, incorporated into and forming part of the record. The question does not depend upon whether the pleas be good or bad, but rests on the plaintiff's title as set forth in the declaration, and upon which alone the judgment can be maintained. Although the Jury have found that there was no shift or contrivance, still, the deed professes to be on the face of it a loan of money, and not a partnership. The case of *Yeoman v. Barstow* is in favour of the defendant, as it established the proposition, that if on the plaintiff's declaration, it is manifest that the contract is usurious, whatever the finding of the Jury may be, he cannot be entitled to the judgment of the Court, but it

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must be entered against him. So, here, if it appears on the face of the deed, that the contract entered into between the parties, was either usurious or a loan, the judgment must be arrested. In *Lord Chesterfield v. Jansen* all the law relative to the subject of usury, was most fully and ably laid down; but the case of *Morse v. Wilson* appears to be decisive of the present, although it has been attempted to be distinguished. In that case, there was a loan of money, which was advanced on a joint bond, by which the lender was to receive 5*l.* per cent. and also a part of the profits of a trade carried on by the borrower in partnership with another, and it was held, that the contract was usurious; and Lord Kenyon there observed (a), that "the simple question was, whether it was not an agreement to receive more than 5*l.* per cent. allowed by law for the forbearance of a loan? Most unquestionably it was, and it was therefore void: that it had been argued however, that it was not an usurious contract, because the principal was put in hazard, as it was liable to the partnership creditors; but it was no farther hazarded than in the case of every other loan, viz. by the risk of the borrower's insolvency; for, as between the plaintiff and the partners in the business, he was not liable to contribute to the losses in the trade." That is the very distinction to be taken here. It must be further observed, that this is an action brought on a deed which is attempted to be enforced by one partner against the other, and not a question as between a partnership and creditors, in which the latter would have a right to consider the plaintiff as liable to the partnership funds in the first instance; and Mr. Justice Buller, in *Morse v. Wilson*, said (b), "in this agreement provision is made to receive the profits, but none to engage for the losses of the trade; and therefore it is not true that the plaintiff's principal was at stake; since by the terms of the contract the trade is to be carried on by the other partners, and the plaintiff is only liable

(a) 4 Term Rep. 356. — (b) Id. *ibid.*

to make good the losses of the trade in the event of the insolvency of the other partners. But as between these parties, if there be any losses, they must be borne by the defendant and the other partner, and if there be any profit, the plaintiff is to receive his proportion of it." So, here, although it has been said, that the plaintiff's principal is in hazard, the answer is, that it is no further so, than he is liable to the partnership debts, but as between themselves he is not liable at all.

It is quite clear, that in order to constitute a partnership there must be a communion of profit and loss. A participation in loss, is the very essence of a partnership, and it cannot exist without it. In *Coope v. Eyre* (a), the Court held, that this was the true criterion to judge by, where the question was, whether persons were partners or not.

The same principle was laid down in *Grace v. Smith* (b), where Sir William Blackstone said (c), "I think the true criterion (when money is advanced to a trader), is to consider whether the profit or premium is certain and defined, or casual, indefinite, and depending on the accidents of trade. In the former case, it is a loan; in the latter, a partnership." That is, if the loss depends at all upon the casualties of trade, then it is a partnership; but if it does not, and it be certain and definite, it is not a partnership, but a loan. Here, the plaintiff advanced his principal to the defendant, a trader, and incurred no liability as a partner; his profit, on the face of the deed, was to be certain and definite: no duty or burthen was imposed on him, nor was there a communion of profit and loss, for he was to receive 10*l. per cent.* for the money advanced by him, with an assurance that the whole of the principal should be returned to him at the expiration of the partnership, and that too, whether the concern were profitable or not, and in no possible way could he sustain a loss, provided the defendant remained

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(a) 1 Hen. Blac. 43.——(b) 2 Sir Wm. Blac. 998.——(c) Id. 1001.


Here, the plaintiff's title is not only defectively set out in the declaration, but impeached by the terms contained in the deed, and on that ground the judgment must be arrested.

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Lord Chief Justice DALLAS.—This case has not only been most ably argued, but fully gone into, both in point of principle and authority; but after all, my opinion will resolve itself into a very narrow compass. This is not a proceeding of a common description, and to be looked at merely by itself, but is to be considered in connexion with the order made by the Vice Chancellor, who has directed in every part of it, a departure from the general course of proceeding. It has been stated in the out-set of the argument for the defendant, that if there be one principle in law more clear than another, it is, that a deed must speak for itself. To that proposition I fully accede, and own I was a little at a loss at first, to understand that a deed which was to speak conclusively, or to be construed in a Court of Law, was to raise an issue of fact, to be submitted to the consideration of a Jury. It is clear, that if a deed must speak for itself, it must be taken singly; but, in the present case, the Vice Chancellor has ordered that it was not to be so taken, but to be considered in combination with collateral circumstances, which were to be made the subject of evidence, so as to apply to an issue to be tried by a Jury as matter of fact. The reason of this, is to me now both obvious and apparent. A deed may be clear or doubtful on the face of it; and if it be doubtful, it must generally raise a suspicion that it was not fairly intended, and therefore, taking for the moment, this deed to have excited such suspicion, what was more rational, than for a Court that is vested with a competent authority, to order, the defendant to be examined upon oath, as being a party to it, thereby embodying or explaining any previous agreement, which might have been made between the parties? Generally speaking, no deed that is intended as shift and contrivance to take an usu-

the deed, speaking for itself, is not to be considered in connexion with collateral circumstances, to be proved by what existed in the minds of the parties before, and in what was done by them at the time of its execution, I wish to know why the Vice Chancellor sent that instrument to be considered at law? If it be, that the agreement speaks for itself, it would have spoken as intelligibly to him, as to us; or if he had wished a decision on the construction of the deed in point of law, merely taken by itself, he might have directed a case for the consideration of the Court. But when he ordered the defendant to be examined,—for what purpose was it, except to take the deed in combination with circumstances extrinsic to it, in order to see, if so connected, whether or not it was merely a contrivance to carry into execution a pre-existing and independent agreement, of which the deed was the machinery, as colour and concealment only; or whether it was, (whatever might have been its effect), legally and properly intended by the parties at the time? It has been said, however, that the Vice Chancellor meant to have the deed considered in combination with other relative circumstances; and I own, my clear opinion is, that his intent was to have it distinctly ascertained, whether it was merely a contrivance to conceal a previous corrupt agreement, reserving to himself all further directions, on which the construction of the deed was to be considered. Even supposing, that the deed was to be taken in combination with collateral circumstances—which has been done—its provisions commented on, and witnesses heard to prove those circumstances, and combine them with the deed,—the Jury have come to the distinct conclusion, that the effect of that instrument was not a shift and contrivance to carry into execution a previous corrupt agreement, but to constitute a partnership between the parties. It therefore appears to me, that there is no substantial ground whatever for granting a new trial; and that the judgment cannot be arrested.

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ordinary case of a dormant partner. It is unnecessary to go through all the terms of the deed; but the opinions of Lord *Kenyon* and Mr. Justice *Buller* in the case of *Morse v. Wilson*, have been pressed upon the Court. That was a demurrer to a plea, in which the facts of usury were stated, and it thereby appeared that the advance was nothing but a loan; and the Court could come to no other conclusion than they did, on the disclosure of those facts; and Lord *Kenyon* said, that "there was no partnership in contemplation." I do not however, presume to give any opinion upon that point; but I own I am at present inclined to doubt the validity of that opinion. If it were a loan, (which the decision imports), I cannot conceive that where one man lends money to another in trade, and receives more than legal interest for it, that he thereby becomes liable to all the debts of the firm; that however, must have been assumed by the Court in that case. But here, it is not because the deed may appear equivocal on the face of it, that the Court must put the construction on it as contended for by the defendant. *Doe, d. Metcalf v. Brown* (a), appears to me to be extremely strong, and upon looking at it, no person can doubt whether there was usury or not. There, a person had borrowed 800*l.* on certain premises, which were to be conveyed as a security for the loan, and the party lending was to receive the 800*l.* at the end of six months, with interest at the rate of 20*l. per cent.*, and in the course of the year, the borrower was to have the premises re-conveyed, if he chose to re-purchase; but he had never been out of possession;—that strongly imported an usurious bargain; and Lord Chief Justice *Gibbs* said (b), that "the agreement to re-purchase, at all events, looked like a loan, but that it was a question for the Jury as to the real intention of the parties." So, in the present case, the whole of the circumstances connected with the deed have been left to the Jury, and it therefore appears to me that they have drawn a right conclusion.

(a) 1 Holt N. P. Rep. 295.—(b) *Id.* 298.

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remaining sum of 500*l.* and give me 50*l.* a year till that is paid:—That would not be usury; although upon the face of the bond itself, there might be strong grounds to suspect it; but the moment the real transaction is stated, the plea of usury falls to the ground, because, to pay 10*l. per cent.* for the loan of 500*l.* is a corrupt agreement; but if one party were to abandon 500*l.* which the other owed him, and take his security for the remaining 500*l.* at 10*l. per cent. per annum*, till that sum was repaid;—it appears clear to me, that that would not amount to usury. So here, the advance might or might not have been usury, as well as shift and contrivance, but on reading the terms of the deed, it does not appear to me to be so. That of itself, however, is immaterial, if, on looking at the whole transaction, it turns out that usury was not intended by the parties.

The statute of *Anne*, on which this question turns, consists of two main parts, the first is, that every bargain or contract for taking more than 5*l. per cent. per annum* for 100*l.* shall be void; and it proceeds to state, that provided any person shall, by shift or contrivance, bargain to receive more than 5*l. per cent.* he shall forfeit treble the sum borrowed. In every plea of usury, that has been framed on that part of the clause, since the passing of the act, the corrupt agreement has been stated: whereas, if the argument for the defendant were to prevail, the moment it is shewn by the contract, that the party was to receive more than 5*l. per cent.* it would be usury. But when 10*l. per cent.* appears to be received on the face of the contract, that is not of itself sufficient to constitute usury; because the transaction is subject to explanation, and it must be seen whether it was a shift or contrivance, or a corrupt contract or not. Unless, therefore, the question had arisen on demurrer, I should not have been satisfied that there was usury. As, however, the whole of the transaction has been most fully gone into, and the facts laid before the Jury, who have found that it was not so, I

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tracted on the face of the instrument, to sell his interest for 800*l.* and to re-purchase it at the expiration of six months for 880*l.* It is true, that there, the contract for the re-purchase was on a separate instrument, but I think that circumstance can make no difference whatever. Nothing could be a stronger ground of suspicion, than that according to the conveyance and re-conveyance, the real intention of the parties was for a loan and forbearance of money on usurious terms for the payment as stipulated for, yet, Lord Chief Justice *Gibbs* there thought, (and most correctly), that "where there was an instrument which purported one thing, and as there were strong grounds to suspect that it meant another, the Jury were to decide as to the real intention of the parties." So, here, if there had been a demurrer, I think the Court could not have decided on the face of the deed *per se*, whether it was usurious or not, but that recourse must have been had to evidence extrinsic to it, and that it was the province of the Jury to decide upon the facts, and which they have now done. It seems to me, that this was a perfect, fair, and honourable transaction between the parties, although, on the face of the deed, it does not appear to be so. Usury often affects the characters of parties in cases of this nature, but in the present I do not apprehend that it does. Here, there was a trade which was *bonâ fide* expected by both parties to produce such a profit as would suffice for them both; for the dormant partner was to content himself with 10*l. per cent.* and leave the remainder to the active one. The defendant refused to allow any one to participate equally in the profits, because he thought that he would be giving a greater advantage than he was bound to provide, in order to obtain the sum he wanted in advance. He might have thought that the plaintiff, by bringing in the capital he did, was not entitled to more than 10*l. per cent.* and the latter never expected to receive more, though the former anticipated that the trade would produce a greater amount of

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Monday,
June 4th.

THIS was an action of *assumpsit*, to recover the purchase-money of an estate sold by the plaintiff to the defendant, which was defended on the ground of a defect in the title.

At the trial of the cause, before Lord Chief Justice *Dallas*, at *Westminster*, at the Sittings after the last *Michaelmas* Term, a verdict was found for the plaintiff, subject to the opinion of the Court, on a case of which the following is the substance:—*Daniel Collyer*, being seised of the legal estate in fee of the manor of *Necton*, and certain lands in the county of *Norfolk*, by his will duly executed and attested to pass real estates, dated the 19th *April*, 1773, devised the same to *Daniel Collyer* his son, for life, without impeachment of waste; remainder to trustees to preserve contingent remainders; remainder to the son and sons of the said *Daniel Collyer* the testator's son, lawfully to be begotten, in such shares and proportions as he should by will appoint, and to the heirs of the body of such son and sons respectively issuing; remainder to all and every the daughter and daughters of his said son *Daniel*, lawfully begotten, and their heirs, to be equally divided between such daughters, if more than one, as tenants in common, and not as joint tenants; re-

A. being seised of an estate in fee, devised the same to his son *B.* for life, remainder to the son and sons of the said *B.* in tail, in such shares and proportions as he should by will appoint, with other remainders over. *B.* had four sons, *C. D. E.* and *F.* By indentures of lease and release, for the purpose of barring all estates tail, and extinguishing the power of appointment so vested in *B.*; he and three of his sons, *C. D.* and *E.* conveyed the entirety of the premises to *G. K.* as tenant to the

præcipe, so that one or more recoveries might be suffered, in which *B. C. D.* and *E.* should be vouchees. A recovery of the entirety of the premises was afterwards suffered, in which *C.* and *D.* were vouched.

By indentures of lease and release for the same purposes as before, *B.* and his sons, *C., D., E.,* and *F.*, conveyed all the premises to *G. K.*, as tenant to the *præcipe*, so that one or more recoveries might be suffered, in which *C., D., E.,* and *F.* should be vouchees. A second recovery was suffered of the same premises, in which *F.* was vouched, and a third was also suffered, in which *E.* was vouchee; *B.* died without executing any appointment:—Held, that by these conveyances and recoveries, the estates tail in *C., D., E.,* and *F.*, were well barred, for that although the interest of each of them was peculiar, it did not exhaust the entirety, but left an interest in each of the others who were not vouched, and which was not intended to be affected, and that an estate of freehold, co-extensive with such unaffected interests, remained in the tenant to the *præcipe*, so as to give validity to the last recovery.

ecuted on the day of the date of the release by *Daniel Collyer* the elder, *Daniel Collyer* the younger, and *John Bedingfield*, and the release was also executed by *Kinderley* and *Domville*.

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A recovery of the entirety of the premises was duly suffered in *Hilary Term*, 47 Geo. 3, wherein *William Domville* was demandant, *George Kinderley* tenant, and *Daniel Collyer* the grandson of the testator, and *John Bedingfield*, vouchees. Duplicates of the indentures of lease and release of the 9th and 10th *February*, 1807, and made between the same parties, by which *Daniel Collyer* the younger, *John Bedingfield*, and *William Collyer*, were to be vouchees, and vouch over the common vouchee, with a declaration of the uses of the recovery, in the same terms as in the former deeds, were executed by *Daniel Collyer* the elder, *Kinderley*, and *Domville*, on the day of the date of the release, and were then sent to *William Collyer* in *India*, and afterwards executed there by him.

By indentures of lease and release of the 3d and 4th *November*, 1809, the release being made between *Daniel Collyer* the elder, of the first part; *Daniel Collyer* the younger, *John Bedingfield*, *William* and *George Collyer*, the four sons of the said *Daniel Collyer* the elder, of the second, *George Kinderley*, of the third, and *William Domville*, of the fourth part; after reciting the will of the testator, it was witnessed, that for barring all estates tail then subsisting upon the manor and lands therein mentioned, and for extinguishing the power of appointment so vested in the said *Daniel Collyer* the elder, they the said *Daniel Collyer* the elder, *Daniel* the younger, *John Bedingfield*, *William* and *George*, did, according to their respective estates and interests, convey to the said *George Kinderley* and his heirs, all the premises before mentioned, to the intent that he might become tenant of the freehold, so that one or more common recovery or recoveries might be suffered, in which the said *George Kinderley* should be tenant, *William Domville* demandant, *Daniel Collyer* the younger, *John Beding-*

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*field, William, and George, vouchees, who should vouch over the common vouches, with a declaration of uses in the same words as in the former recovery of the 47 Geo. 3, which should enure to the same uses, trusts, and purposes as were set forth in the deeds of release of the 9th and 10th February, 1807. These deeds were executed by Daniel Collyer the elder, George Collyer, Kinderley, and Domville.*

A recovery was suffered in pursuance of the last-mentioned deed of release in *Hilary Term, 50 Geo. 3*, wherein the said *William Domville* was demandant, *George Kinderley* tenant, and *George Collyer*, vouches, who vouched the common vouches of the entirety of the premises comprised in the recovery of *Hilary Term, 47 Geo. 3*. A recovery was also suffered in *Michaelmas Term, 51 Geo. 3*, in which *Domville* was demandant, *Kinderley* tenant, and *William Collyer* vouches, who vouched the common vouches of the entirety of the premises comprised in the recovery of *Hilary Term, 47 Geo. 3*. *Daniel Collyer*, the son of the testator, died without executing the power of appointment limited to him by the will. The question for the opinion of the Court was, whether by the several deeds of the 9th and 10th *February, 1807*, and the 3d and 4th *November, 1809*, and the recoveries suffered in *Hilary Term, 47 Geo. 3*, *Hilary Term, 50 Geo. 3*, and *Michaelmas Term, 51 Geo. 3*, the estates tail of the four sons of *Daniel Collyer* the devisee for life, in the will of *Daniel Collyer* the testator, of the 19th *April, 1773*, and the remainders over created by that will were effectually barred. If the Court should be of opinion that they were so barred, then the verdict found for the plaintiff was to stand, but if they should be of opinion that they were not effectually barred, a verdict was to be entered for the defendant.

The case came on for argument on a former day in this term, when

Mr. Serjt. *Bosanquet* for the plaintiff, submitted that the only question was, whether at the time the last recovery was

suffered, in which *William Collyer* was the vouchee, there was a sufficient estate remaining to make a good tenant to the *præcipe*.

The objection raised by the defendant to the title of the estate is, that the effect of the two former recoveries was to draw the entirety of the estate out of the tenant to the *præcipe*, so as to leave nothing to him in the last. But all the recoveries are equally good, and have the effect of barring the estates tail, as at the time they were suffered, there was a sufficient estate in each of the tenants to the *præcipe* to support them. The only ground on which they may be attempted to be impeached is, that they must be construed strictly as real actions, but that is not so, for Lord *Kenyon*, in the case of *Roe, d. Crow v. Baldmere* (a), said, that "the Court could not enter into the forms of a recovery; they are, perhaps, inexplicable; but they must be taken as a mere mode of conveyance by a tenant in tail, and ought so to be considered in all respects: and that it was so considered in *Martin, d. Tregonwell v. Strachan* (b)," where Lord Chief Justice *Lee* said, "at common law upon an estate tail (which was a fee-simple conditional), a remainder could not be limited over, because but a possibility: but the statute *de donis* makes an estate tail; and a recovery is an inherent privilege in that estate, which was never taken away by the statute. The law takes it as a conveyance except out of the statute, as if he were absolutely seised in fee; and this is by construction of law; and so it is expressly declared by Lord *Hale* (c), and so is *Popham* (d), which shews that common recoveries are considered as conveyances by tenant in tail; for if they were considered as real recoveries, and not as conveyances, all charges and incumbrances made by tenant in tail would be gone." So, in *Pigott on Recoveries* (e), it is said, that "common recoveries are now become common assurances of land, and therefore are favoured by the Judges, and the intent of the

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(a) 5 Term Rep. 112. — (b) Id. 110, n. — (c) 1 Mod. 110. —  
(d) Page 6. — (e) Page 26.

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parties respected and supported as far as may be; and that a fine, recovery, and deed to lead the use, are all but one conveyance though they have several operations." If a person be tenant in tail of a moiety, and suffer a recovery of an entirety, such recovery shall operate only as to the part to which he was entitled. In *The Marquis of Winchester's case* (a), it was held, that if there be two joint-tenants of a manor, and a writ of entry of the whole manor is brought against one of them, on which a common recovery is suffered, it will only be good for the moiety of the person against whom the writ was brought, but 'as to the other moiety, it will be void for want of a tenant to the *præcipe*; and it was there said, that "common recoveries, as much as any benign interpretation of law will permit, ought to be maintained, because they are the common assurances of the land." The same doctrine is laid down in *Ischam v. Morrice* (b) where it was determined, that if one seised of a third part of land, bargains and sells a moiety, and a common recovery is suffered of a moiety, this is a good recovery of an entire third, and not of a moiety of a third part.

The general doctrine as to the effect of suffering a recovery, where a tenant in tail is entitled to part only, is thus laid down in *Pigott* (c), "if a man have a moiety or third part of lands, and suffer a common recovery of the whole, the moiety or third part passes, and shall be to such uses as are declared by the common recoveries." In *Comyn's Digest* (d) it is said, that "if one tenant in common levies a fine, or makes a feoffment, &c. of the whole; his moiety passes." Here, therefore, the interest did not pass out of the tenant to the *præcipe* in the last recovery, by the two first, as they merely tended to operate on so much as the vouchees were seised of in tail. The periods at which they were suffered ought not to be scrutinized, for they formed parts of one general assurance. Where a conveyance consists of a number of interests, of which a re-

(a) 3 Rep. 3. — (b) Cro. Car. 109. — (c) Page 99. —  
 (d) Tit. Estate K. 8.

covery forms one, and the various parts of it are executed at different times, to carry into effect the conveyance or assurance of land, it must be considered as one assurance; and the Court will so construe it. In *Lord Cromwell's case* (a) it is stated, that, "although a bargain and sale, recovery and fine, be made, suffered, and levied at several times, yet all of them, by the mutual agreement of the parties, make but one and the same assurance of one and the same manor, according to one and the same original bargain and contract, and therefore each of them tends to perfect the bargain, none of them to destroy any part of it, or to overthrow the true intent and meaning of the parties in any thing, but shall be taken as one and the same assurance, made at one and the same time;" and it is also said (b), that "in common recoveries, the common usage and intent of the parties is to be respected."

In *Dowman's case* (c), it was resolved, that an indenture made after a recovery was suffered, was sufficient to direct and declare the uses of a precedent recovery. The case of *Havergill v. Hare* (d), is in point, to shew that the dates of different instruments are not to be regarded; for it is there said (e), that "the law neither sees nor regards any time but the time of the first agreement, notwithstanding divers assurances be in different times, and all lent to perfect one assurance; and by construction of law they shall all be said to be made at one and the same time, otherwise all assurances might be shaken." So, (f) that "the execution of all things executory, still hath respect unto the original act, and that variance in time shall never destroy the original agreement between the parties if no mesne agreement can be proved to be between them; but that the use shall be according to the first indentures." The principle laid down in *Doe, d. Odiarne v. Whitehead* (g), is strongly applicable to the present question, where a

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(a) 2 Rep. 75. — (b) Id. 74. — (c) 9 Rep. 10. — (d) 3 Bulst. 250. — (e) Id. 256. — (f) Id. 257. — (g) 2 Burr. 704.

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tenant in tail conveyed premises before marriage, but did not levy a fine until afterwards; and it was contended, that there had been no discontinuance:—Lord *Mansfield*, however, there said (a), “all was executory at the time of making the lease and release, which were executed previous to the marriage; and the covenant contained in the release was to levy a fine thereupon, in order to carry them into effect; all these are to be considered as but one conveyance; and they operate as a declaration of uses; which uses all arise out of the fine.” In *Lord Anglesey v. Lord Akham* (b), where a fine was levied and a common recovery suffered, wherein the conusee was tenant, but no uses of the fine were declared;—it was held, that at the common law, the use was always intended to be to the conusee, and that he was in by the fine immediately, and so that there was a good tenant to the *præcipe*. In *Bushell v. Burland* (c), Lord Chief Justice *Holt* said, “if a fine is levied by husband or wife, of lands which he hath in right of his wife, and there is a deed made at the same time to declare the uses thereof, and afterwards this deed is lost, and then another is made to the same effect and dated as the first, that deed is sufficient to declare the uses of the fine.” Here, one object only was contemplated by the parties, viz. to bar the estates-tail, and there is nothing to shew that they intended that the two former recoveries should operate so as to leave no sufficient estate in the tenant to the *præcipe* in the last. The terms of all the recoveries were the same, and the uses were reserved in the same manner, and it is therefore quite clear that the estates-tail in the vouchees were well barred, and consequently there can be no objection to the title of the estate in question.

Mr. Serjt. *Lens*, *contra*.—It is not necessary to attempt to disturb the cases which have been cited for the plaintiff; nor object to the principles therein contained, as they are

(a) 2 Burr. 712.—(b) 2 Salk. 676. S. C. Cas. Temp. Holt, 733, 11 Mod. 210. Gilb. Rep. 16.—(c) Cas. Temp. Holt, 735.

inapplicable to the present question, which is not the case of one conveyance consisting of different parts, but the last recovery is of itself a separate and distinct instrument, and was intended by the parties so to be. As, therefore, the entirety of the estate, passed by the two first recoveries, it must follow, that the tenant to the *præcipe* in the last, had no estate whatever, and it is therefore an imperfect attempt to effectuate that which ought to have been done to complete the intention of the parties. The principle laid down by Lord Kenyon, in *Roe, d. Crow v. Baldwre*, that "the Court will not apply to a recovery those strict rules which govern real actions in other cases," is perfectly consistent with the present question; for here, the whole of the foundation of the latter recovery was gone, and it is therefore inoperative and void. The doctrine cited from *Comyn's Digest*, does not approach this case, as all the interest of the tenant to the *præcipe*, in the last, had been conveyed and operated on, by the two former recoveries. Each of the sons of the devisee had an interest in entirety; it would have been altogether different if each had possessed an individual or separate share. So, the case of *Doe, d. Odiarne v. Whitehead* is inapplicable to the present, as all the instruments were there considered as branches of the same conveyance, and the arguments were founded on *Seymour's case* (a), but the Court drew a distinction, and observed, that "the bargain and sale there was totally unconnected with the fine." So, here, the last recovery is altogether independent of the two former. *Lord Anglesey v. Lord Altham*, stands on its own peculiar ground, and that of *Bushell v. Burland* is referrible to the same point. Here, new recoveries may be now suffered, and as the forms required by the testator have been violated, the estates-tail are not well or sufficiently barred, and the defendant therefore cannot be compelled to complete his purchase.

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(a) 10 Rep. 95. S. C. 2 Barr. 708, n.



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Mr. Serjt. *Bosanquet*, in reply.—No authority has been cited for the defendant, in contradiction of the doctrine laid down in those cases which have been relied on for the plaintiff, and which tend to shew that a recovery is now to be considered as a common assurance, to enable a tenant in tail to convey what he otherwise could not do. A recovery without a voucher must be considered as a nullity, and can have no effect whatever. The precise time when the deeds were executed is immaterial, for in *Goodright, d. Burton v. Rigby (a)*, it was decided, that though the deeds to make a tenant to the *præcipe* be not executed until after the execution of the writ of seisin, still, a recovery is good under the 14 *Geo. 2. c. 20*, if the deeds be executed in the Term in which the recovery is suffered. That has in substance been complied with in the present case; and as it was said in *Cromwell's case (b)*, that “conveyances, which are used for common assurances of land, shall be expounded and construed according to common allowance, without prying into them with eagles’ eyes;” the Court will not consider it necessary that recoveries must be conducted and completed according to certain ceremonies and solemnities with analogy to the proceedings in real actions, but, on the contrary, will hold, that all the different parts of a recovery are to be taken as one entire transaction, and will therefore lend their assistance in giving it full effect.

Cur. adv. vult.

Lord Chief Justice DALLAS on this day delivered the judgment of the Court as follows:—

This was an action of *assumpsit* brought upon a contract for the sale of an estate, which was defended on the ground of a defect in the plaintiff’s title. At the trial, a verdict was found for the plaintiff, subject to a special case. [Here his Lordship stated the substance of the case.]

(a) 5 Term Rep. 177. S. C. = Hen. Blac. 46. — (b) = Rep. 74.

The objection to the title, which has been insisted upon in the argument on behalf of the defendant, is, that the recovery last suffered, in which *William Collyer* was the vouchee, had no operation to bar his interest as tenant in tail, because it is said, that when that recovery was suffered, *George Kinderley*, the tenant to the *præcipe*, had no estate remaining in him; for it is contended, that the whole of the estates which were conveyed to him by the deeds of 1807 and 1809, were respectively divested and taken out of him by the recoveries before suffered in pursuance of those conveyances.

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The general principles applicable to fines and common recoveries, considered as recognized modes of conveyance, appear to have been settled by several cases, many of which have been cited at the bar. In the language of Lord Chief Justice *Willes*, in delivering the opinion of the Judges in the House of Lords in *Martin, d. Tregonwell v. Strachan* (a), "they are to be considered only as common assurances, and not at all as real transactions. They are conveyances on record, invented to give a tenant in tail an absolute power to dispose of his estate, as if he were tenant in fee-simple." The intent of the parties, is the principle on which their operation is to be construed. It is admitted, that if the four sons of *Daniel Collyer*, the tenant for life, had each a distinct fractional interest as tenants in tail in remainder, (for example, if each had been tenant in tail in remainder in one undivided fourth part), then the recoveries in which they were respectively vouched, though purporting to be levied of the entirety, would only have operated on their respective fractional interests, and would not have divested the tenant to the *præcipe* of the remaining fractional parts of the freehold, to which the interest of the vouchees did not extend.

We are of opinion, that the same principle applies to the recoveries which have actually been levied. For although

(a) *Willes' Rep.* 448, 451.

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the interest of each of those tenants in tail was of a peculiar kind, and in a certain sense may be considered as extending to the entirety; yet, it did not exhaust the entirety, but still left an interest in each of the others, who were not vouched. This interest of the others was not intended to be affected; and we think was not affected, and consequently that an estate of freehold, co-extensive with such unaffected interest, remained in the tenant to the *præcipe*, and was sufficient to support and give validity to the last recovery.

Judgment for the plaintiff.

Monday,
June 4.

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A decree by the Commissioners of Sewers, is not conclusive against a party assessed for the payment of a rate, and who resides within the district over which they have jurisdiction; but such party may prove in an action of trespass brought by him against one of the collectors of the rates, for taking his goods to satisfy such rate, that he derived no benefit from the sewer in respect of which the assessment was made—and

THIS was an action of trespass for seizing and taking the plaintiff's goods, and detaining them until she paid a sum of money in order to regain their possession. The defendant pleaded, first, Not Guilty; secondly, a general justification under the authority of the Commission of Sewers, in force at the time when, &c. and that the property was taken as a tax assessed by virtue of the said Commission, and according to the statute of sewers, 23 Hen. 8. c. 5.; thirdly, a justification similar in terms to the second, under lii Geo. iii.; and lastly, a justification under the authority of the Commission of Sewers, in force at the time when, &c., by the statute of sewers, 23 Hen. 8. and the several other statutes relating thereto. The plaintiff added a *similiter* to the first plea, and replied *de injuriâ* to the three others.

At the trial of the cause, before Lord Chief Justice Dallas, at Westminster, at the Sittings after the last Michaelmas Term, the Jury found a verdict for the plaintiff, with no such evidence having been rejected at *Nisi Prius*, the Court granted a new trial.

inimal damages, subject to the opinion of the Court on the following case:—The plaintiff is the owner of, and resident in a house adjoining the high road, *Knightsbridge*, in the parish of *Saint Margaret*, in the city of *Westminster*; the defendant is one of the collectors of the Commissioners of Sewers for the district in which the plaintiff's house is situate, and took the goods which are the subject of the present action, as a distress, by virtue of a warrant duly executed by such Commissioners, who had holden a Commission of Sewers for the city and liberty of *Westminster*, and the precincts thereof, and for the parish (among others) of *Saint Margaret, Westminster*, on the 8th *August*, 1817, at which the Jury presented, among other things, that theretofore, the Commissioners had laid out and expended divers sums of money, in cleansing, embanking, and repairing a sewer in that parish; and that the charges thereof, and also the charges of all other works, and of all incidental expences necessarily incurred, and to be incurred, in and about the said sewer, ought to be borne, paid, and defrayed by the several persons, owners or occupiers of messuages, lands, &c. *whose rain and waste waters descending, issuing, and falling, have passed and ought to pass through the said common sewer into the river Thames*, proportionably, and according to their respective interests in the said messuages, &c. and to the several yearly rents and profits thereof, as the said several rents and profits were thereafter added to the respective names of the respective owners or occupiers, in three separate and distinct levels; and in the first level (*viz. the parish of Saint Margaret, Westminster*), the plaintiff was rated at 300*l.* The Court of Sewers then made a decree, by which it was adjudged, that a rate or assessment should be charged upon the several lands, messuages, &c. *within the district of, or receiving benefit from the said sewer*, mentioned and comprized in the said presentment, at 6*d.* in the pound. In the year 1819, another presentment, decree, and rate were made, similar to the above.

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These several presentments, decrees, and rates, being proved, and also that the plaintiff's house was within the district comprised in them, and that she had refused payment of the sum rated, after due notice and demand;—the plaintiff offered evidence to prove that she derived no benefit whatever from the sewer in question. The defendant objected to the admission of such evidence, on the ground, that as the plaintiff's house was situate within the district to which the jurisdiction of the Commissioners of Sewers for the city and liberty of *Westminster* is extended by the statute *xlvi Geo. iii. c. vii.* she was liable to the rate, and that the presentment and decree were conclusive against her.

The question for the opinion of the Court was, whether such evidence were admissible or not. If they should be of opinion that it was, a new trial was to be granted, but if they should be of opinion that such evidence was not admissible, a nonsuit was to be entered.

The case came on for argument on a former day in this Term, when

Mr. Serjt. *Hullock*, for the plaintiff, submitted, that the only question was, whether a person whose house is situate within a parish or district where an assessment is made by Commissioners for a sewer's rate, is liable to pay such assessment, if he derive no benefit from the sewer in respect of which the assessment is made? The maxim, *qui sentit commodum, debet et onus sentire*, is particularly applicable to the present point. The proceedings of the Commissioners are restrained and regulated by the statute *23 Hen. 8. c. 5.* and their jurisdiction extends only over persons who derive benefit from the sewers, and not over those who derive no benefit, but merely reside within the district over which they may have the superintendence or controul. It appears from *Keighley's case (a)*,

(a) 10 Rep. 139.

that if the damage done were of such a nature that private individuals, who were bound to repair walls or banks, could not guard against the accident, and a commission issued to enquire who was to suffer any loss or damage, they were to contribute to the repairs; but if it were such that care could prevent, then the expence was to be borne by those who were bound to repair. In *Callis on Sewers* (a), it is said, that "persons who have the *usus rei*, should, before others, be bound and tied to the repairs of such things whereof they have peculiar and several profits and use of more than others have." So, it is said (b), that "if in the case of sewers, a township should be taxed, yet that this tax could not be taken or levied, but only of such as had grounds within the charge, which had good by the repair, or might have hurt by the neglect thereof." It is likewise said (c), that "the statute extends itself to reach every man that hath grounds lying within the level, and which partake of the good which the defences bring to them, to be contributable to the charge." So (d), "if a new sewer is to be cast, the Commissioners must lay the charge on the level which is to take benefit thereby, as well for the new building thereof, as with the maintaining of it." So, it is stated (e), that "where the draining of superfluous waters in S. appears to be only commodious for S. and that D. another town had no good thereby; and it appears also, that by the repairing of the ancient sewer in D. that town only had benefit thereby; therefore to assess S. to repair in D. and D. to contribute to S. where there could be no benefit, is directly against the letter and sense of the law of sewers; but herein; that either of them ought to have been at charge with that; by which it took benefit, and not otherwise." And again it is laid down (f), that "the words of the statute are in effect, 'and all such which reap profit or sustain damage;

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(a) 2nd edit. page 121. — (b) Id. 125. — (c) Id. 129. —
(d) Id. 148. — (e) Id. 151. — (f) Id. 222.

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shall be assessed.' " Here, however, it has been said, that the statutes xlvii Geo. iii. sess. 1. c. vii. and lii Geo. iii. c. xi. s. viii. extend the jurisdiction of the Commissioners; but the former gives them no additional power to subject a person to be assessed, unless he derives an advantage, or is capable of receiving an injury from the repair or non-repair of the sewer. That statute merely defines the limits within which the Commissioners for the city and liberty of *Westminster* shall have jurisdiction over persons who receive benefit, but the costs of repairs are to be borne as was directed by the former statutes. That of lii Geo. iii. is wholly inapplicable to the present question, as it merely empowers the Commissioners of Sewers for *Westminster* to purchase a messuage and premises for holding their meetings, and to borrow or raise money by way of annuity. In *Masters v. Scraggs* (a), it was decided, that the Commissioners of Sewers could not assess a person in respect of drains which communicated with other drains that fell into the great sewer, unless it appeared that he was likely to be benefited by the works done upon the sewer; and here, evidence was offered to prove that the plaintiff derived no benefit whatever from the sewer in question, and it does not appear that the drains of her house had any communication with it. That evidence, if it had been admitted, would have been a complete answer to the present action, for in *Dore v. Gray* (b), Mr. Justice Buller drew the line for the jurisdiction of the Commissioners to be this, viz. "where it is stated that the party over whose land the work is done, is, or is likely to be benefited by it: if he be so, that is sufficient to give them jurisdiction." In *Netherton v. Ward* (c), the question was, whether a tenement situate in a dock yard was liable to be rated to the sewers, and it was held, that as a benefit was derived from the sewer by the occupier, he was liable to such rate. These cases, therefore, have been determined on

(a) 3 Maul. & Selw. 447.—(b) 2 Term Rep. 366.—(c) 3 Barn. & Ald. 21.

the principle, that a party is liable to be rated, not because he merely resides within the jurisdiction of the Commissioners, but because he has derived, or is likely to derive a benefit from the sewer for which he has been rated. If this be so, the Commissioners cannot assume a jurisdiction by rating a person who derives no benefit from the sewer for which the rate is imposed; and even if his consent to the assessment were given, it would not confer a jurisdiction where the proceeding is *coram non judicé*; for in *Brown v. Compton (a)*, where the statute 37 Geo. 3. c. 112, authorised Justices of Peace at the first or second General Quarter Session or General Session to be holden after the passing of that act, or some adjournment thereof, to discharge insolvent debtors under certain circumstances; and the Justices in S. at an adjourned Session, held just after the act passed, the adjournment being of a Session holden before the act passed, ordered the keeper of the sheriff's prison to discharge an insolvent—it was held, that the adjourned Session had no jurisdiction, and that the officer was not justified in obeying the order of such Session. It is therefore perfectly clear, that if a Court not having jurisdiction, order an officer to do an act, and the officer obeys the order, he is not justified in so doing. The case of *Brittain v. Kinnaird (b)* does not affect the present, as there the magistrate had jurisdiction, and it was held, that his conviction was conclusive evidence of the facts stated in it, if it were a legal instrument, and no defect appeared on the face of it. Here, however, the presentment and decree shew that the Commissioners have exceeded their jurisdiction, as those instruments pointed out what persons should be deemed liable to the assessments. The jurors presented, that the charges of repairing the sewer ought not to be borne generally by the persons within the level or jurisdiction in which the plaintiff was

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(a) 8 Term Rep. 424.——(b) Ante, vol. iv. page 50.

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rated, but by the several persons, owners or occupiers, whose rain and waste waters have passed and ought to pass through the sewer. The defendant, therefore, should have shewn that such rain and waste waters passed from the plaintiff's house through the sewer in question, but he has merely stated that it was situate within the jurisdiction of the Commissioners. By the decree, the rate was to be charged upon the several messuages within the district of, or receiving benefit from the sewer. Although a person residing within the district, may by possibility, derive an advantage from the sewer, still, it does not render him liable to be rated, unless he receives a benefit by his waste waters being carried off thereby. Whether, therefore, the plaintiff received an actual benefit from the sewer at the time she was rated for it, or not, is the only question, and which ought to have been submitted to the Jury. As therefore, the statutes relative to, as well as the Commission of Sewers itself, confined the jurisdiction of the Commissioners to rate those persons only who derived a benefit from the sewer on account of which the assessment was made, and as the presentment and decree have been so framed, and are in terms confined to persons of that description, the plaintiff ought not to have been excluded from shewing whether she had received a benefit from the sewer in question or not, and therefore the exclusion of that evidence rested on no warrantable or legal foundation.

Mr. Serjt. Taddy, *contra*.—The case of *Brittain v. Kinnaird* does not approach the present question, which is confined to whether the evidence tendered by the plaintiff at the trial, was admissible or not. From the time of the passing of the statute 23 Hen. 8. to the present, it is quite clear, that persons who reside within the district are liable to be assessed on that ground alone, and that those who reside without it, are equally liable, if they derive a benefit from the sewer in respect of which the assessment is made. The Commission of Sewers was established

for the purpose of giving a general benefit by drainage, and it would be extremely difficult for the Commissioners to shew a particular benefit, for if it were so, it would impose on them the task of proving that every person within their district, was either an owner, or occupier of the premises for which he was assessed. A person may derive no particular benefit from an embankment being made against the sea, still, he would be liable to contribute to the repair of such embankment. Previously to the passing of the statute 23 Hen. 8. a writ or commission was granted, giving jurisdiction to the Commissioners either over those who resided within their district, or those who might derive a benefit from the erection of a sewer, or sustain an injury from the want of it. In *Registrum Brevium* (a), the commission is in these terms, viz. "*assignavimus vos ad supervidendum wallias, fossatas, gutteras, seweras, &c. et ad inquirendum per quorum defectum hujusmodi damna contigerint ibidem, et qui terras vel tenementa ibidem tenent sua communiana pasturæ aut piscariæ in partibus illis vel etiam defectionem commodum et salvationem seu etiam damnum per trenchas prædictas sustinent vel sustinere poterint.*" So, by the statute, the Commissioners are authorised to enquire through whose default any damages may have happened, and who holdeth any lands, or may have any hurt, loss, or disadvantage by any impediments and annoyances; and that all those persons might be assessed. The terms, therefore, of the writ, as well as the statute, are both in the disjunctive.

In *Masters v. Scroggs*, it appeared that the plaintiff's house was not situate within the jurisdiction of the Commissioners by whom the assessment was ordered to be made. It therefore might be necessary to shew that he had received a benefit, as he resided out of the district for which he was charged. The stat. 3 Jac. 1. c. 14. provides, that "all walls, sewers, water-courses, &c. within the limits of two miles of Lon-

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(a) Page 127 b. *De Wallis et Fossatis*, &c. See also Fitzherbert's *Natura Brevium*, 113.

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don, shall be subject to the Commission of Sewers, and to all the statutes relative thereto," and in *Masters v. Scroggs* it was stated, that the plaintiff's house was above two miles from the boundaries of the city of *London*. It also appears, from *Dore v. Gray*, that the plaintiff's house, and the place where the work on the sewer for which the assessment was made, had been done, were about two miles from the city. So, the doctrine laid down in *Callis* as to the *usus rei*, applies only to persons who may be resident without the district; but if they reside within it, it is not necessary to shew such use or enjoyment. So, also, in page 125, that writer merely states how a township should be taxed. With respect to the reference made to page 129, it only relates to tithes, in which case it was stated, that the statute extends itself to reach every man that hath grounds lying within the level. It must therefore be presumed, that every one residing within the district of the Commissioners, receives a benefit so as to render him liable to the assessment imposed [Lord Chief Justice *Dallas*.—The distinction now taken appears to be, that if lands are not within the district, it is necessary to shew that the person rated has or may receive a benefit, but that if he reside within the district, it is not necessary to do so, as such benefit must be implied from the locality of situation.] Here, it was shewn, that the plaintiff's house was within the district of a particular level, all the inhabitants of which were liable to be rated to the sewer, whether they received a benefit from it or not. That the Commissioners had a competent jurisdiction to make the assessment cannot be denied; for in *Callis* (a) it is expressly laid down, that "although a traverse may be taken to a presentment in the Court of Sewers, yet that if the Commissioners have made a decree thereupon, then no traverse can be taken, because a decree is the final judgment of the Court, and is a judicial act which cannot be traversed and tried by a jury;" and here,

(a) Page 216.

the decree is made in the alternative, charging those having lands or messuages within the district, or those receiving benefit from the sewer. The decree does not extend beyond the presentment, because it adjudges that the assessment be charged upon the lands mentioned and comprised therein. If the plaintiff had derived no benefit from the sewer, she should have made that objection, and traversed the presentment, but it is too late to make it after the decree, and more particularly so, as the house for which she was charged is situate within the district: the object of the *xlvii Geo. iii. c. vii.* was to make all persons liable who resided within it. She might then either have traversed, that she was not living within the district, or that she received no benefit from the sewer. The case of *Netherton v. Ward* does not apply to the present, as it merely turned on the question whether the occupier of a tenement in the dock yard was liable to be rated to the sewers. Here, as the plaintiff resided within the district, she was at all events likely to be benefited by the sewer, and evidence could not be admitted to shew that she had derived no benefit from it.

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Mr. Serjt. *Hullock* in reply.—It has been contended for the defendant, that under the Commission of Sewers, and on the construction of the statute *23 Hen. 8. c. 5.* the mere residence of a party within a particular district, subjects him to be assessed to the rate, but no authority or *dictum* has been cited in support of that position. On the contrary, it is stated in *Callis (a)*, that “it may be objected, that if a town or hundred may be jointly taxed, then it might so come to pass, that one man’s goods which had no grounds subject to the charge, and which could not reap nor take any hurt thereby, might come to be distrained for the whole tax, rate, or sess of the town; and another man which had great quantities of grounds there subject to danger,

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might escape free; and therefore such exposition to be made of the said law, was not within the rule and compass of equality." So, also, it is laid down (a), that "if a town be assessed in the tax, and the collector doth distrain the goods of a man of the town who was not chargeable thereto, that party may have and take his action of trespass against the distrainer and collector, for that he at his peril must look well to it, that he whose goods were taken were subject to the charge;" and the Year Book, 11 Hen. 4. fol. 35. is cited in support of that position. "So, in the case of sewer, if the goods of one which were not subject to the tax or assess imposed, were taken; he might have his action of trespass against the distrainer, and recover damages thereby." So, it is said (b), that "every man that hath grounds lying within the level, and which partake of the good which the defences bring to them, is to be contributory to the charge." It therefore appears, that persons within the district, are not chargeable unless they receive a benefit from the sewer upon which the assessment is imposed. So, the distinction taken in page 151 shews, that the statute is not to be taken in the disjunctive, but is applicable only to those parties who may participate in the benefit to be derived from the sewer, and not otherwise. It is now for the Court to say, how far the jurisdiction of the Commissioners is extended by the statute xlvii Geo. iii. c. vii. which is confined to locality only, and not to the persons rateable within the district. It has been said, that it would be inconvenient if the Commissioners were obliged to shew whether a party was benefited by the drainage or not; but here, it is contended, that evidence is not even admissible to allow the party assessed to shew whether she received any advantage or not. As to whether the plaintiff was entitled to traverse the presentment or not, is immaterial, as it is impossible that she could have been cognisant of the proceedings before the Commissioners. Even if she had been acquainted with them, the decree is not conclusive, as by

(a) Page 125. — (b) Page 129.

the statute 23 *Hen. 8. c. 5. s. 11.* it is provided, that "if an action of trespass be brought against any person for taking a distress by authority of any laws made by virtue of the Commission of Sewers, the defendant may justify that the distress was made by the authority of the Commissioners, which the plaintiff may traverse; and, on the trial, the whole matter may be given by both parties in evidence, according to the truth of the same.

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*Cur. adv. vult.*

Lord Chief Justice DALLAS on this day, having stated the pleadings and facts as before set forth, delivered the judgment of the Court as follows:—

In this case it will not be necessary to go into a great deal of matter that has been brought forward at the bar. The question submitted for our opinion is merely this:—Ought the plaintiff to have been admitted to prove what she offered evidence to establish, *viz.* that she derived no benefit from the sewer, in respect of which the assessment was made? To this point then, the present consideration is confined. The Commissioners are only to assess those who receive, or are likely to reap profit, or who have, or may sustain hurt, loss, or disadvantage, or as is stated by the Court in *Masters v. Scroggs* (a), "It ought to appear that the party receives, or is likely to receive a benefit." This being clearly the ground of the jurisdiction of the Commissioners, it is not necessary to consider, with reference to the present purpose, how the common law originally stood, or what alteration different statutes have made from time to time, which may, upon many occasions, lead to very important questions. *Dore v. Gray* (b), was an action of trespass for taking the plaintiff's goods—the defendant pleaded the general issue, and a justification under the Commissioners of Sewers; and, on a case reserved, it was stated that the rate was regularly made, if the Commissioners

(a) 3 Maul. & Selw. 450 ——— (b) 2 Term Rep. 538.

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had jurisdiction, and whether they had or had not, was deemed by Mr. Justice *Buller* to depend on the fact, whether the party assessed derived benefit, or was likely to derive benefit from the sewing; and it being found as a fact, that the plaintiff might have sustained disadvantage, if the works had not been done, the Commissioners were held to have jurisdiction, and the defendant had judgment accordingly. *Masters v. Scroggs* (a) was also an action of trespass, with a similar justification, and the point decided was, that the Commissioners of Sewers cannot assess a person in respect of drains which communicate with other drains that fall into the great sewer, if the level of his drains is so much above the sewer, that the stopping of it could not possibly throw back the water, so as to injure his premises, and if he be not, and it does not appear that he is likely to be benefited by the works done upon the sewer. In the present case, the plaintiff offered evidence to prove that she derived no benefit from the sewer in question. The case states, that this was objected to, on the ground that her house was within the district comprised in the decree, and it has been insisted that the presentment and decree were conclusive against her. But this depends on the question of jurisdiction, and the Commissioners could not conclude the party assessed without allowing her an opportunity of being heard. To this point, the two cases I have referred to, fully go; for if the assessment had been conclusive, a case could not have been reserved, finding a fact, so as to raise on such fact the question of jurisdiction for the opinion of the Court, namely, (as in *Masters v. Scroggs*), that the party received no benefit; which necessarily implies such evidence to have been admissible and received at the trial. These cases are incompatible with the ground of objection made in the present as to the evidence;—namely, that being within the district, was sufficient: for such was the case in *Masters v. Scroggs*, in which the assessment was by the Commissioners for the limits of *Holborn*, and the plaintiff's

(a) 3 Maul. & Selw. 447.

house was situate within the division of *Holborn*. In both these cases, therefore, it was taken for granted that such evidence is admissible, and on the general sense and reason of the thing, it appears equally to be so. In some stage or other, the party who is to bear a burthen, on the ground that he derives, or is likely to derive a benefit, or is in danger of taking some hurt, ought to have an opportunity of shewing that no benefit is or can be derived, nor hurt sustained. This, he has not before the presentment is made, nor while it is making, nor before the decree, nor has he any notice of the presentment or the decree, but by the assessment, and notice of such assessment, or demand under it. The effect, therefore, of rendering the presentment and decree conclusive, would be to decide against the party unheard, and without allowing him any possibility of being heard. On general principles, this would be unjust, but it is enough to state the cases referred to, in order to shew that the assessment is not considered as conclusive. This is fortified by the statute 23 *Hen. 8. c. 5. s. 11*, by which it is provided, that "if any action of trespass be brought against any person for taking distress, or doing any other act by authority of the commission, or by authority of any laws or ordinances made by virtue of the Commission of Sewers, the defendants in such action shall and may make avowry, cognizance, or justification for the taking of the same distress, or other act, alleging in such avowry or justification that the said distress, trespass, or other act, was done by the authority of the Commissioners, (as by reference to the statute will more fully appear); whereupon the plaintiff shall be admitted to traverse such cause so alleged, and the issue shall be tried by a verdict of twelve men, and not otherwise, as is accustomed in other personal actions; and upon the trial of the issue, the whole matter shall be given by both parties in evidence, according to the truth of the same." The result, therefore, is, that in this case, the rule must be made absolute for a new trial.

Rule absolute.

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under 10*l.*, though the cause of action accrued and the plaintiff resided out of the jurisdiction; and that if such an action were brought elsewhere, the Court, on motion, would deprive the plaintiff of costs.

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Mr. Serjt. *Vaughan* and Mr. Serjt. *Pell* afterwards shewed cause, on an affidavit of the plaintiff, which stated, that he was one of the attornies of this Court, and as such, had brought an action of *assumpsit* against the defendant here, by attachment of privilege, to recover his demand from the latter, to whom a bill had been duly delivered before the commencement of the action. They submitted, that he was entitled to do so, as he had sued as an attorney of the Court, and not as a common person, and that he was not deprived of the right of suing here, by the statutes in question. The 15 *Geo. 3.* is confined to debts not amounting to 40*s.*; but by the 47 *Geo. 3.* the jurisdiction of the Court is extended to 5*l.* The 18th section of that statute contains a clause precisely similar, in terms, to the *London Court of Requests Act* (a); and although, by the 10th section of that statute, it is provided, that no privilege shall be allowed to exempt attornies from the jurisdiction of the Court constituted by that act, it has yet been held, in the case of *Board v. Parker* (b), that attornies *plaintiffs*, were not compellable to sue there for a debt under 5*l.*, at the peril of costs. The 47 *Geo. 3.*, however, contains no clause of that description. It has also been tacitly admitted by this Court, in *Tagg v. Madan* (c), and *Parker v. Vaughan* (d), that they would not allow a suggestion to be entered on the roll, or give a defendant leave to plead that the cause of action arose within the jurisdiction of a Court of Requests, where the plaintiff was an attorney, unless he waived his privilege as such, by suing as a common person. Here, however, the plaintiff has

(a) 39 & 40 *Geo. 3. c. 104. s. 12.* — (b) 7 *East, 47.* — (c) 1 *Bos. & Pul. 629.* — (d) 2 *Bos. & Pul. 29.*

moned to appear before the Commissioners, who were empowered to make such orders and decrees between the parties as they may think fit;" and by the 13th section, it was further enacted, that "if any action should be commenced in any other Court than the said Court of Requests, for any debt not exceeding 5*l.*, and recoverable by virtue of the 15 *Geo.* 3. and that act, or either of them, in the said Court of Requests, then, the plaintiff in such action, should not, by reason of a verdict for him, or otherwise, have or be entitled to any costs whatsoever; and if the verdict should be given for the defendant in such action, and the Judge before whom the same should be tried should think fit to certify that such debt ought to have been recovered in the said Court of Requests, then the defendant should have double costs, and such remedy for recovering the same as any defendant might have by law." And by the 25th section it was provided, that "no attorney, solicitor, or any person practising the law, should be permitted to appear in the said Court of Requests, as an attorney, solicitor, or advocate, on behalf of any plaintiff or defendant, or any other person, or be admitted to speak before the said Court, in any cause, action or matter, in which such attorney or solicitor is not himself a party or witness." It is therefore quite clear, that although persons be not resident within the jurisdiction, yet they may sue there for any cause of action not exceeding 5*l.*; and if it was intended that attornies, plaintiffs, should be excluded, the same exception would have been introduced in the statute, as in the *London Court of Conscience Act* 39 & 40 *Geo.* 3. c. 104. s. 10.

The cases of *Parker v. Vaughan*, and *Tagg v. Madan*, have no application to the present, as there the plaintiff, an attorney, had waived his privilege, by suing as a common person. [Mr. Justice *Burrough*.—In *Wiltshire v. Lloyd* (a), it was decided, that an attorney was not subject to the jurisdiction of the County Court of *Middlesex*; and in *Gardner*

(a) 1 *Doug.* 380.

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thereby, then, the plaintiff shall not, by reason of a verdict for him, have or be entitled to any costs whatsoever."

The plaintiff's action is founded on an *indebitatus assumpsit*, and also on a *quantum meruit*, and was brought in this Court. The venue was laid in the county of *Lincoln*, and he obtained a verdict for 1*l.* 11*s.* 6*d.* only. My Brother *Hullock* has obtained a rule, calling on the plaintiff to shew cause why he should not be restrained from taking out execution for costs. The plaintiff's answer to this motion is, that he is an attorney of this Court, and that he has sued in this cause by attachment of privilege; and we are of opinion that this is a decisive answer to the motion.

There can be no doubt that an attorney has the privilege of suing as such by attachment of privilege, in the Court of which he is a minister. That privilege is particularly recognized in the case of *Gardner v. Jessop* (a), where it is said to be allowed him for the sake of the Court and the suitors. If he sues as an ordinary man by original, then he is to be considered as any other plaintiff, as was held in *Tagg v. Madan* (b), and *Parker v. Vaughan* (c). This privilege however may be taken away by the express words of an act of Parliament, or by the construction of a statute, in which express words are not to be found, as appears by the case of *Evans v. Jones* (d). There, the plaintiff, an attorney, sued the defendant, residing in *Wales*, by attachment of privilege issued out of the Court of King's Bench, for words spoken in *Wales*. He laid his venue in a *Welsh* county, in order that he might have the benefit of the statute 13 *Geo.* 3. c. 51. s. 1., and tried his cause at *Hereford*, being the next *English* county, and obtained a verdict for five shillings only; and Lord *Kenyon*, who tried the cause, certified under that act, that the defendant was resident in the dominion of *Wales* at the time of the service of the writ; and the Court of King's Bench, in *Michaelmas* Term, 1795, ordered, according to

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(a) 2 Wils. 42.—(b) 1 Bos. & Pul. 629.—(c) 2 Bos. & Pul. 29.  
(d) 6 Term Rep. 500.

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KEATS v. HICK.

Monday,  
June 4.

THIS was an action of debt, on an annuity bond.

The declaration stated, that the defendant, on the 6th *July*, 1812, by his certain writing obligatory, acknowledged himself to be held and firmly bound to the plaintiff, in the sum of 800*l.*, which writing obligatory, was subject to a certain condition, whereby, after reciting that one *Thomas Moyer Keats*, in consideration of the natural love and affection which he had for the plaintiff, (his mother), and for the purpose of making some provision for her support and maintenance, had agreed to grant and secure to her an annuity of 40*l.* for her life; and that for the better securing the due payment thereof, the said *Thomas Moyer Keats* had requested the defendant to become jointly and severally bound with him as his surety, in the above bond to the plaintiff, which he had consented to do:—it was declared that the condition of the bond was, that if *T. M. Keats* and the defendant should pay the plaintiff the said annuity of 40*l.* during the term of her life, by two equal half-yearly payments in each year, then the bond was to be void. The plaintiff then assigned for breach, that 120*l.* for three years of the said annuity was owing to her, and still in arrear and unpaid. The defendant pleaded, first, *nil debet*, secondly, that he ought not to be charged with the debt by virtue of the bond, because, before the making thereof, the plaintiff having for several years carried on the wine and spirit trade to great advantage, she was, on the 6th *July*, 1812, induced, at the request of her two sons, the said *Thomas Moyer Keats* and one *Joseph Keats*, to sell such trade, and that she did then accordingly sell the same; and that the money arising therefrom, together with whatever money she possessed, amounting to 1000*l.* the plaintiff advanced to

An annuity bond given in consideration of the natural love and affection which a son bore towards his mother, and for making some provision for her support and maintenance,—need not be registered under the 17 *Geo. 3. c. 26*, although it appeared that the grantee sold her trade, and the money arising therefrom, together with whatever money she possessed, to her son, for the purpose of establishing him in business.

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her two sons, to place them out in business; and that, in consideration thereof, it was agreed between her and them, that each of them should give her an annuity bond of 40 *per annum*, and that they should procure some person to join with them by way of further security, for the punctual payment of such two several annuities;—that in pursuance of the said agreement, the said *Thomas Moyer Keats* and the defendant, as security for him, executed and delivered the bond in the declaration mentioned to the plaintiff, who accepted the same for the consideration aforesaid. The defendant then averred, that no memorial was enrolled in the High Court of Chancery, within twenty days of the execution thereof, according to the statute 17 *Geo. 3. c. 26*, whereby the said writing obligatory was null and void.

The plaintiff joined issue on the first plea, and as to the second, protesting that it was insufficient in law, nevertheless for replication in this behalf, she said, that the defendant did not deliver the said writing obligatory, nor did she accept the same in pursuance of the agreement, and for the consideration in that plea mentioned, on which issue was also joined.

There were other pleas, stating, that the plaintiff had advanced to *Thomas Moyer Keats*, the said sum of 1000*l.* before the making of the bond, and that, in consideration thereof, it was afterwards agreed between her and him, that the latter should give her an annuity bond of 40*l. per annum*, and that he should get some person to join with him by way of further security, for the punctual payment thereof; that before the making of the bond, she had advanced divers sums of money, amounting to 1000*l.* to her two sons, to place them out in business, and that the annuity in the condition of the bond, in the declaration mentioned, was granted by the said *Thomas Moyer Keats* to the plaintiff for a pecuniary consideration, to wit, 1000*l.*, advanced to him by her. On these pleas, issue was also joined.

At the trial of the cause, before Lord Chief Justice *Dallas* at *Guildhall*, at the Sittings after the last Term, the execution of the bond by the defendant was proved, and that he had paid the annuity to the plaintiff for four or five years, and that three years were then in arrear. The defendant, in support of the second plea, gave in evidence an affidavit of the plaintiff, upon which the Court of King's Bench had been lately moved against the defendant's solicitor, to deliver up the bond in question, wherein she stated, that for several years after her husband's death, she carried on the wine and spirit trade to great advantage, and was induced, at the request of her two sons, to sell her trade, and that the money arising therefrom, together with whatever monies she possessed, she advanced to them to place them out in business; and as she would, by such advance, leave herself entirely destitute of the means of subsistence, it was agreed, that each of her two sons should give her an annuity bond for 40*l. per annum*, and that they should get some person to be a collateral security. It was also proved, that on the plaintiff's sons being desired to assist her, the one said, that "he would do as his brother did."

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For the defendant, it was contended, that as the bond was granted in part for a pecuniary consideration, it required to be enrolled under the statute 17 *Geo. 3. c. 26*.

His Lordship left it to the Jury to determine, whether it was granted in whole or in part for a pecuniary consideration, and they found a verdict for the defendant on the second plea; but liberty was given the plaintiff to move, that judgment might be entered up for her, notwithstanding such verdict.

Mr. Serjt. *Onslow*, on a former day in this Term, had accordingly obtained a rule *nisi*, that the plaintiff might be

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at liberty to enter up judgment for 120*l.*, being the arrears of the annuity. He submitted, that as the bond was given in consideration of the plaintiff's resigning her business to her sons, it was not necessary to be enrolled; and that even if it had been given according to the terms of the second plea, no memorial was requisite, as it was there stated, that she had sold her business, and the money arising therefrom, which was indefinite and uncertain, and had no regard to a pecuniary consideration, within the meaning of the statute; and he relied on the cases of *Hutton v. Lewis* (a), *Crespigny v. Wittenoom* (b), *Horn v. Horn* (c), and *Doe, d. Johnston v. Phillips* (d), as being applicable to, and decisive of the present.

Mr. Serjt. *Lens* now shewed cause. The affidavit of the plaintiff, on which the second plea is founded, shews most clearly, that the bond was given for a pecuniary consideration, it was therefore unnecessary to prove the precise amount; and the defendant is entitled to retain the verdict found for him on that plea.

The money arising from the trade, together with whatever money the plaintiff might possess, were both capable of being ascertained at the time the bond was given. Although it appears upon the face of it, that the annuity was granted in consideration of the natural love and affection which the plaintiff's son had for her, still, it was granted with reference to a pecuniary consideration, which might have been reduced to a precise and definite sum at the time. This, therefore, is not similar to the case of a voluntary annuity, or the mere resignation of a trade or business by the grantee, for she assigned to the grantors whatever money she was possessed of at the time, and the bond therefore required to be enrolled, according to the terms of the statute.

(a) 5 Term Rep. 639. — (b) 4 Term Rep. 790. — (c) 7 East, 523, (d) 1 Taunt. 356.

Mr. Serjt. *Onslow*, in support of the rule.—It is quite clear, that with reference to former authorities, the bond in question did not require to be memorialized. In construing the provisions of the statute, it is necessary to look at the whole context matter, which merely relates to those annuities which are granted in consideration of something paid. The case of *Doe, d. Johnston v. Phillips*, is stronger than the present, where it was held, that no memorial was necessary to be enrolled of an annuity granted in consideration of the grantee resigning her trade and leasehold premises to the grantor; though part of the consideration was book debts and stock in trade, the former of which were specified in a schedule, and their amount ascertained at the time.

So, in *Hutton v. Lewis*, it was determined that an annuity granted in consideration of the grantee resigning his situation as master of an academy, in favour of the grantor, need not be registered, even though at the time of the grant, the grantee agreed to assign over to the grantor his fixtures, household furniture, &c. at an appraised value, and to advance the sum of 300*l.* to the grantor by way of loan, to be repaid with interest. That was clearly a pecuniary consideration, and yet the Court were of opinion that no enrolment was necessary, and no distinction can be drawn between the relinquishing or selling a trade: they are in terms the same.

So, in *Crespigny v. Wittenoom*, it was decided, that if an annuity be granted in consideration of the grantee's giving up his business to the grantor, it need not be registered; and Lord *Kenyon* there said (*a*), that "it was apparent from the preamble, and the different clauses of the act, that the legislature did not intend that there should be any memorial of an annuity like that; that it was evident that the act was intended as a check against hard bargains, and that no decision had extended the provisions of the first clause, beyond the cases

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(a) 4 Term Rep. 792.

case from those which have preceded it. In *Hutton v. Lewis*, the annuity was granted in consideration of the grantee's resigning his profession of a schoolmaster in favour of the grantor, and at the time of the grant, the former entered into an agreement to lend a sum of money to the latter, to be repaid with interest; but the Court held, that as the loan was at the option of the grantor, it formed no part of the consideration of the annuity, which was therefore confined to the grantee's resigning his situation as a schoolmaster in favour of the grantor, and consequently, that the annuity need not be registered. That decision, therefore, leaves the present case to stand on its own general grounds; but it has been contended, that as the consideration consisted partly in the plaintiff's relinquishing her business, and also in advancing whatever money she was possessed of, it must be taken to be in part a pecuniary consideration within the meaning of the statute. The case of *Doe, d. Johnston v. Phillips*, was decided subsequently to that of *Hutton v. Lewis* and seems to me to be in principle scarcely distinguishable from the present. There, the grantee resigned her trade and premises to the grantor, and part of the consideration was stock in trade and book debts amounting to 380*l*. It appears too, in that case, that their value was ascertained and specified in a schedule; but here, the consideration was indefinite and uncertain; and Lord Chief Justice *Mansfield* there said (a) that "to bring an annuity within the act, the consideration must be money only." Here, it is quite clear that the consideration was not money alone, but the relinquishment of the plaintiff's business and the money arising therefrom, which formed the most material part of it. On the whole, therefore, I am of opinion that no memorial was necessary to be enrolled; and consequently, that this rule must be made absolute.

Mr. Justice PARK.—I am extremely happy to concur with my Lord Chief Justice. I at first felt some difficulty;

(a) 1 Taunt. 357.

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but now think that the case of *Doe v. Phillips* goes the full length of the present. In *Horn v. Horn*, it was determined, that the statute 17 Geo. 3. c. 26, as appears from the whole purview of it, is confined throughout to annuities granted upon pecuniary consideration alone, and Lord *Ellenborough* there said (*a*) that "the body of the act was not general, but was only meant to apply to annuities granted upon pecuniary considerations, and that the whole range of the act shewed it." Here, the transaction between the parties appears to me to be most praiseworthy, viz. the relinquishment of a business by a mother in favour of her sons, from whom she was to receive an annuity, as a provision for her future support and maintenance; and taking all the circumstances of the case together, the object of the annuity was fair and reasonable in itself, and the parties did not intend to evade the statute by not having caused the bond in question to be enrolled.

Mr. Justice BURROUGH.—I entertain no doubt whatever but that the plaintiff is entitled to recover. As a mother, she was bound to provide for her children:—she did so, by placing them out in trade. Although, at the first blush, it seemed to me that the annuity was granted partly on a pecuniary consideration, still, I am happy to concur with the Court in thinking that it did not; and the case of *Doe v. Phillips* appears to be decisive of the present.

Mr. Justice RICHARDSON.—The substance of the transaction between the parties clearly was, that the plaintiff should make a provision for her sons, by placing them out in trade. If that be so, the pecuniary consideration is incidental, and not the substantive cause for which the annuity was granted. Independently of this, however, I think the case of *Doe v. Phillips* is in point, and consequently that this rule must be made

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REGULA GENERALIS.

IT IS ORDERED, That in all country ejectments, which hereafter shall be served before the essoign day, either of *Michaelmas* or *Easter* Term, the time for the appearance of the tenant in possession shall be within four days after the end of such *Michaelmas* or *Easter* Term, and shall not be postponed till the fourth day after the end of *Hilary* or *Trinity* Term, next respectively following.

R. DALLAS.

J. A. PARK.

J. BURROUGH.

J. RICHARDSON.

END OF EASTER TERM.



AN
I N D E X

TO THE
PRINCIPAL MATTERS.

ABANDONMENT.

See **INSURANCE, 2.**

ABATEMENT.

See **ARREST, 2.**

ACCOUNT STATED.

See **ASSUMPSIT, 2.**

AC ETIAM,

See **VARIANCE, 5.**

ACTION.

See **CONSTABLE.**

LIMITATIONS, STATUTE OF.

ACT OF BANKRUPTCY.

See **BANKRUPT, 1, 2. 4.**

ACT OF PARLIAMENT.

See **STATUTES.**

ADMINISTRATOR.

See **EXECUTORS.**

AFFIDAVIT.

See **BAIL, 5.**

RECOVERY, 1.

**AFFIDAVIT TO HOLD TO
BAIL.**

See **ARREST, 2.**

VARIANCE, 3.

1. An affidavit to hold to bail by the plaintiff, stating that the defendant was indebted to him in a certain sum, as indorsee of bills of exchange, drawn by *E. F.* upon and accepted by the defendant, payable to the order of the said *E. F.* at a day then past, and indorsed to the plaintiff, — is sufficient, without further showing the relation between the plaintiff and defendant. So, an affidavit stating that the defendant was indebted to the plaintiff in a certain sum, as indorsee of a bill drawn by *H. F.* upon and accepted by the defendant, payable to the order of *E. F.* at a day then past, —

- is equally sufficient and certain. *Lamb v. Newcombe*, M. 1 G. 4.
Sams v. Edwards, ib. Page 14
 2. So, an affidavit of debt made by I S., that the defendant was indebted to the plaintiff in a certain sum as acceptor of a bill of exchange, bearing date on a certain day, drawn by the plaintiff on, and accepted by the defendant, payable two months after date thereof, and due at a day now past—is sufficient, without further showing the relation between the plaintiff and defendant, or adding that the bill remained unpaid. *Warmley v. Mory*, M. 1 G. 4. 62

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1. 2. an auctioneer, being employed to sell an estate belonging to B., entered into and signed an agreement with C., for the purchase, in his own name, as agent of B., and B. shortly afterwards signed it, and added, "I hereby sanction this agreement, and approve of A.'s having signed the same on my behalf:"—Held, that A. was not personally responsible. *Spittle v. Lavender*, H. 1 & 2 G. 4. 270
 2. The mere circumstance of a principal's drawing bills on his factor to whom goods were consigned, to be provided for out of the proceeds of such goods,—does not authorise the factor to pledge them, for the purpose of raising money to meet the bills:—Where, therefore, the factor had become bankrupt, and the pawnee had afterwards sold the goods:—Held, that the principal might recover as against him, the whole of the proceeds of such sale, in an action for money had and re-

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- ceived, although the factor had appropriated part of the money advanced by the pawnee to the payment of one of the bills drawn by his principal. *Gill v. Kymer*, E. 2 G. 4. Page 503
 3. Where a foreign merchant consigned goods to his correspondent in London, who pledged them with a factor as and for his own property, and received the amount in advance, and afterwards became bankrupt:—Held, that the factor was liable to the foreign merchant in trover for the goods. *Duclos v. Ryland*, E. 2 G. 4. 518, n.

AGREEMENT.

See AGENT, 1.

USE AND OCCUPATION.
 VARIANCE, 1.

ALLOWANCE OF BAIL.

See BAIL, 2.

ALTERATION.

See WILL.

AMENDMENT,

See AWARD.

Of FINES—See tit. FINE.

Of RECOVERIES—See tit. RECOVERY.

See also VARIANCE, 2, 3, 5.

In an action of debt, to recover penalties against a sheriff's officer for extortion under the 32 Geo. 2. c. 28—the Court will not allow the declaration to be amended by inserting new counts on the 23 Hen. 6. c. 9. *Wright v. Ager*, E. 2 G. 4. 330

ANNUITY.

ANNUITY.

See ASSUMPSIT, 2.

DEVISE, 2.

EXECUTORS, 1.

LIMITATIONS, STATUTE OF.

1. An annuity deed contained a covenant by the grantor, that he would not at any time during the continuance of the annuity, go upon the seas, or parts beyond them, without first giving the grantee seven days notice in writing of such his intention, in order to enable him to pay such additional premiums of insurance as might be incurred on account thereof, which premiums the grantor covenanted to pay to the grantee:—Held, that it was not necessary to state such covenant in the memorial under the statute 53 Geo. 3. c. 141. *Wood v. Perrott*, M. 1 G. 4. Page 63
2. A fair and *bonâ fide* sale of an interest in land, where the consideration, in part or in whole, is an annuity to be paid to the vendor, the consideration for granting such annuity, is not a pecuniary consideration or money's worth, within the meaning of the statute 53 Geo. 3. c. 141. Where, therefore, the plaintiff had assigned an interest in coal mines to the defendants, in consideration of an annuity for her life, and for the payment of which, a bond was conditioned: Held, that such bond did not require enrolment, under that statute. *James v. James*, E. 2 G. 4. 479
3. An annuity-bond, given in consideration of the natural love which a son bore towards his mother, and for making some provision for her support and maintenance,—need not be re-

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gistered under the 17 Geo. 3. c. 26, although it appeared, that the grantee sold her trade, and the money arising therefrom, together with whatever money she possessed, to her son, for the purpose of establishing him in business. *Keats v. Hick*, E. 2 G. 4. Page 629

ANNUITY-BROKER.

See LIMITATIONS, STATUTE OF.

APPEARANCE.

See ARREST, 3.

ARBITRATION.

See AWARD.

ARBITRATOR.

See TROVER.

ARREST.

1. Where an attorney was made bankrupt, and described in the Gazette as a "dealer and chapman," and obtained his certificate, and the plaintiff afterwards arrested him as acceptor of a bill of exchange, payable before the commission issued,—the Court discharged him on common bail, although the plaintiff swore that he did not know that the defendant was the person mentioned in the Gazette, and that he intended to dispute the validity of the commission on the ground of fraud.—He should have stated the nature of such fraud, and when he discovered its existence. *Kemp v. Neville*, M. 1 G. 4. 21
2. To an action of *assumpsit* against the defendant as acceptor of a bill of exchange for 45*l.* he pleaded, after setting out the statute 51 Geo. 3. c. 124, that the plaintiff sued out a writ of *capias ad re-*

spondendum against him by the name of *Joseph*, for 45*l.* on an affidavit of debt made by the plaintiff's clerk, under which the defendant was arrested, and afterwards allowed to go at large by the sheriff—that the writ was afterwards altered, by inserting the name of *Robert*, (the real name of the defendant) instead of *Joseph*, under which he was again arrested, without any fresh affidavit of debt, as required by that statute:—Held bad, on special demurrer, as it did not go to the merits of the action, and as the defendant might either have pleaded in abatement, or moved to set aside the proceedings for irregularity. *Warmsley v. Macey*, H. 1 & 2 G. 4. Page 168

3. If a defendant be arrested by the name of *Josiah*, instead of *Josias*, the Court will discharge him out of the custody of the sheriff on his entering a common appearance, and undertaking to bring no action against the plaintiff or sheriff. *Johnson v. Cooper*, E. 2 G. 4. 472

ARREST OF JUDGMENT.

See USURY.

ASSETS.

See PLEADING, 1.

ASSIGNEE.

See BANKRUPT, 1.

WITNESS, 1.

ASSIGNMENT OF BREACHES.

See BOND.

ASSUMPSIT.

ASSUMPSIT.

See ARREST, 2.

BANKRUPT, 3.

LIMITATIONS, STATUTE OF.
VARIANCE, 1. 5.

1. A sale of goods effected by fraud does not change the property in them: Therefore, where the defendant had fraudulently colluded with *I. S.* who was in insolvent circumstances, to obtain wines from the plaintiff, the proceeds of which eventually came to the defendant's hands, in satisfaction of a debt before due to him from *I. S.*:—Held, that the plaintiff was entitled to recover in an action for money had and received. *Abbotts v. Barry*, M. 1 G. 4. Page 98
2. Where the plaintiff in a declaration of *assumpsit* stated, that in consideration that he would employ the defendant (an annuity broker,) to invest and lay out the plaintiff's money in the purchase of an annuity, the defendant undertook to invest it on good and valid security; and assigned for breach, that he laid it out on a bad, invalid, and fraudulent security: and the defendant pleaded *non assumpsit infra sex annos*, and *actio non accrevit infra sex annos*, on which issue was joined, and it was proved that the consideration money was paid over to the grantor, and the annuity paid by the hands of the defendant to the plaintiff for six years afterwards, when the grantor became bankrupt, and the security failed; subsequently to which, the defendant's managing clerk promised that the plaintiff should be paid, which promise the defendant afterwards recognized: Held, that the plaintiff

AWARD.

could not recover for money had and received, the money having been paid over to the grantor:—nor on an account stated, as there was no existing antecedent debt between him and the defendant. *Whitehead v. Howard*, M. 1 G. 4. Page 105

ATTORNEY.

See ARREST, 1.
BANKRUPT, 3.
COSTS, 1. 3.

If an attorney of this Court has entered into trade, and discontinued to practice for twelve years, the reasons for his quitting such trade must be satisfactorily explained before he can be re-admitted. *Ex parte Mayer*, M. 1 G. 4. 141

AUCTIONEER.

See AGENT, 1.
INSPECTION OF PAPERS.

AVOWRY.

See REPLEVIN, 1.
VARIANCE, 4.

AWARD.

See TROVER.

If all matters in difference in the cause are agreed to be referred to an arbitrator, and the Associate by mistake draws up the order of reference generally as to all matters in difference between the parties,—it cannot be amended, but the parties must go down to another trial. *Rawtree v. King*, H. 1 & 2 G. 4. 167

BAIL BOND.

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BAIL.

See AFFIDAVIT.
ARREST, 1.

1. Bail rejected, on the ground of his being one of the turnkeys of the King's Bench Prison. *Daly v. Brockschaffe*, M. 1 G. 4. Page 72
2. The Court will not discharge the rule for allowance of bail, on account of perjury in one of them, who had sworn on his justification, that he was a house-keeper, and a few days before, that he was not. The plaintiff's only remedy is by indictment. *Shee v. Abbott*, E. 2 G. 4. 321
3. The Court will not order an *exoneretur* to be entered on the bail-piece, on the ground of the defendant's having obtained his certificate in Ireland; but will direct an issue, in order to ascertain the circumstances under which the original debt was contracted. *Bamfield v. Anderson*, E. 2 G. 4. 331
4. A continuance of notice of bail, where time was not given by the Court, need not be served before three o'clock, as specified in the rule, *Michaelmas Term*, 60 G. 3. *Williams v. Taylor*, E. 2 G. 4. 472
5. If the justification of bail by affidavit be opposed by another affidavit, stating the insolvency of one of the bail, the Court will not allow the matters of the latter affidavit to be answered. *Aplin v. Fox*, E. 2 G. 4. 482

BAIL BOND.

See PLEADING, 2.
VARIANCE, 3.

Where a defendant applied to the under-sheriff, before the return of the writ, to surrender

himself in discharge of his bail, which he refused to accept, without assigning any reason for so doing, and the day after, he surrendered himself to the keeper of the county gaol, which was also before the writ was returnable, and the bail bond was afterwards assigned to the plaintiff,—the Court ordered the proceedings on it to be stayed, without costs. *Lewis v. Davies*, H. 1 & 2 G. 4. Page 267

BAILIFF.

See REPLEVIN.

BAILMENT.

The law will imply, that a person who hires a horse, is bound to provide him with food, unless there be an agreement to the contrary. *Handford v. Palmer*, M. 1 G. 4. 74

BAIL PIECE.

See BAIL, 3.
VARIANCE, 5.

BANKRUPT.

See AGENT, 2.
ARREST, 1.
EVIDENCE, 1.
LIMITATIONS, STATUTE OF.
WITNESS, 1.

1. *A.* being indebted to *B.* and *Co.*, who became bankrupts, deposited a promissory note with the defendants as their assignees, and afterwards paid them the amount of the debt due from him to *B.* and *Co.*, on which the note was given up; the commission against

BANKRUPT.

- them was superseded, and another issued, under which the defendants were re-appointed assignees. Four months after *A.* had made the payment to them, he became bankrupt on a secret act of bankruptcy previously committed by him:—Held, in an action for money had and received, brought by his assignees against the defendants in their own right, between the superseding the first commission, and issuing the second, that they were not entitled to recover; the payment made to the latter by *A.*, being protected by the 46 Geo. 3. c. 135. s. 1., as the subsequent commission re-vested those rights in the defendants, which they believed to exist when the payment was made, and as such payment, if made to *B.* and *Co.*, could not have been disturbed, if they had remained solvent. *Davenport v. Carter*, M. 1 G. 4. Page 16
2. A denial by a trader, to the collector of church and highway rates, who called for assessments due from him, after he had given a general order to be denied to all comers, is an act of bankruptcy; and such order is sufficient evidence of a beginning to keep house, with an intent to delay creditors; and a beginning to keep house with such intent, constitutes an act of bankruptcy, although no creditor is actually delayed thereby. *Lloyd v. Heathcote*, M. 1 G. 4. 129
 3. Where the mortgage of a bankrupt's estate called on the commissioners to direct a sale, under Lord Loughborough's order of March, 1794, and became the purchaser at such sale:—Held, that in an action for money paid, brought by the solicitors to the

BILLS OF EXCHANGE, &c.

assignees, he was liable to reimburse them the expences of advertisements, and the commissioners' fees for their attendance to perfect such sale, although the estate sold was insufficient to cover the sum originally advanced by such mortgagee. *Bowles v. Perring*, H. 1 & 2 G. 4.

Page 290

4. Where a trader ordered his servant to say, that if any creditors called, he was not at home, and he was accordingly denied, but was in bed ill at the time:—Held, that it was properly left to the Jury, whether this was a beginning to keep house with an intent to commit an act of bankruptcy, and that they were warranted in finding that it did.—Where a trader committed an act of bankruptcy on the 9th November, and the sheriff took his goods in execution on the 15th, and sold them on the 21st December, and a commission was issued on the 23rd, and an assignment made on the 6th January following:—Held, that the assignees might maintain trover against the sheriff, although he had sold before the assignment was made, as the bankrupt's property vested in them by such assignment, from the act of bankruptcy, by relation. *Lazarus v. Waithman*, E. 2 G. 4. 313

BILLS OF EXCHANGE AND PROMISSORY NOTES.

See AFFIDAVIT TO HOLD TO BAIL,

1. 2.

AGENT, 2.

ARREST, 1. 2.

BANKRUPT, 1.

EXECUTORS, 2.

LIEN.

PARTICULARS OF DEMAND.

BOND.

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BILL OF LADING.

See LIEN.

Where, by a bill of lading, goods were to be delivered "to the defendant, nett proceeds paid to the plaintiff, or to his assigns, he or they paying freight for the said goods, as per charter-party:" Held, that the freight was to be paid by the defendant, and that the nett proceeds to be paid the plaintiff, were what remained after such freight and other charges had been satisfied. *Thomson v. Adam*, H. 1 & 2 G. 4. Page 280

BILL OF PARTICULARS.

See PARTICULARS OF DEMAND.

BOND.

See ANNUITY, 2. 3.

To an action of debt on bond, the defendant craved oyer, and after reciting a mortgage deed, which shewed the condition to be for payment of a sum of money on a day specified, according to the tenor of the proviso contained in the indenture, and for the performance of the covenants therein; pleaded, that there were no negative or disjunctive covenants in the indenture, and that he paid the money mentioned in the condition on the day therein specified, according to the effect thereof, and performed all the covenants and provisoes in the indenture on his part to be performed:—the plaintiff, in his replication, took issue generally on the non-payment of the money, and concluded to the country. On special demurrer, assigning for

848 CONSENT RULE.

causes, that it should have concluded with a verification, and that no breach of the condition was assigned, according to the statute 8 & 9 Will. 3. c. 11. s. 8: Held, that such replication was good, as the only point in issue was the payment of the money, and as the plaintiff had therein denied the whole substance of the defendant's plea. *Darbishire v. Butler*, H. 1 & 2 G. 4.

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CERTIFICATE.

See BAIL, 3.

CHARTER-PARTY.

See FREIGHT, 1.
INSURANCE, 1.
LIEN.

CHURCH-RATE.

See BANKRUPT, 2.

CODICIL.

See DEVISE, 1.

COGNIZANCE.

See REPLEVIN, 1.

CO-HEIRS.

See DISTRESS, 2.

COLLECTOR OF TAXES.

See BANKRUPT, 2.

COMMISSION AND COMMISSIONERS.

See BANKRUPT, 1. 3.
SEWERS.

CONSENT RULE.

See EJECTMENT, 2.

COSTS.

CONSIDERATION.

See ANNUITY, 2, 3.
ASSUMPSIT, 2.
LIMITATIONS, STATUTE OF.

CONSIGNMENT.

See AGENT, 2, 3.
LIEN.

CONSTABLE.

Where constables were directed under a warrant to search for and take black cloth, supposed to have been stolen, and they took cloths of a different description and colour, and carried them before a magistrate, refusing, at the time they took them, to inform the owner whether they acted under a warrant or not:—Held, that they were within the protection of the statute 24 Geo. 2. c. 44. s. 8., and therefore, that an action against them ought to have been commenced within six calendar months from the time of such taking; and it seems, that that section applies to all cases of constables acting as such. *Smith v. Wiltshire*, E. 2 G. 4. Page 322

CONTRACT.

See VARIANCE, 1.

CONVERSION.

See TROVER.

CONVEYANCE.

See RECOVERY, 4.

COSTS.

See EJECTMENT, 2.

1. *A.* brought an action of use and occupation against *B.* and recovered a verdict, and *B.* after-

COSTS.

wards commenced an action of trespass against *A.* for seizing his cattle for rent due, and *A.* suffered judgment by default, and on a writ of inquiry, *B.* recovered 1*l.* more in damages than *A.* had obtained in his action:—Held, that the costs of the one might be set off against the other, although it appeared that *A.* was insolvent, and that his attorney would be thereby deprived of his security for costs. *Lomas v. Mellor*, M. 1 G. 4.

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2. Where the defendant had obtained a verdict, and the Court granted a new trial, on the ground that it was against evidence, and directed the costs of the former trial to abide the event of the second, and on that trial the plaintiff had a verdict:—Held, that he was only entitled to the costs of such second trial. *Brown v. Boyn*, H. 1 & 2 G. 4.

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3. An attorney plaintiff, is not compellable to sue in a court of requests, unless his privilege is taken away by the express words or necessary construction of the statute establishing such court. Where, therefore, an attorney of this Court, sued here by attachment of privilege, and recovered less than 5*l.*, the Court refused to restrain him from taking out execution for costs, although the debt for which the action was brought was recoverable under the 47 Geo. 3. c. 37, which enacts, that "if any action should be brought in any other court for a debt not exceeding 5*l.*, and recoverable by virtue of that act, in the court of Requests established thereby, the plaintiff, by reason of a verdict for him, should not have any costs." *Johnson v. Bray*, E. 2 G. 4. 622

COVENANT.

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COURT OF REQUESTS.

See COSTS, 3.

COVENANT.

See ANNUITY, 1.

BOND.

EXECUTORS, 1.

LIEN.

POWER, 1.

USURY.

VARIANCE, 2.

1. The plaintiffs being possessed of lands, which they held under the Archbishop of *Canterbury* by lease, renewable on payment of certain fines and fees, under-let such lands to the defendant for a term, who covenanted that "he would from time to time, and at every time during the said term, pay to the plaintiffs, or the Archbishop, such part of the fines and fees, which, upon every renewal by the plaintiffs, of the lease by which they held the premises demised, (among others) should be paid or payable by the plaintiffs in respect of the premises thereby demised to the defendant:—Held, that the reasonable construction of this covenant was, that the defendant only intended to pay fines commensurate with his interest in the premises. *Charlton v. Driver*, M. 1 G. 4. Page 59
2. To an action of covenant by tenants in common, for not repairing a messuage:—Plea, that the lessee, after the demise to him, and before the breach complained of, had purchased the interest of one of the lessors, whereby the lessee became tenant in common of the premises with the plaintiffs:—Held ill, on general demurrer, and that the action was properly brought, *Gates v. Cole*, E. 2 G. 4. 554

DEMURRER.

DAMAGES.

See TROVER.
USE AND OCCUPATION.
USURY.

DEBT.

See PLEADING, 2.

DEBTOR AND CREDITOR.

See EXECUTION.
WITNESS, 1.

DECLARATION.

See EVIDENCE, 1.
PLEADING, 2.

DEED.

See ANNUITY, 1.
EXECUTORS, 1.

A deed *inter partes*, is only available between those who are parties to it. *Barford v. Stuckey*, M. 1 G. 4. Page 23

DEFEASANCE.

See WARRANT OF ATTORNEY.

DEMISE.

See REPLEVIN, 1.

DEMURRER.

See BOND.
COVENANT, 2.
REPLEVIN, 1.

DEVISE.

See RECOVERY, 4.
WILL.

1. Devise of all testator's real and personal estates to his brother in fee, whom he appointed executor and residuary legatee: By a

DEVISE.

codicil, reciting the testator's will, and the death of his brother, and that the testator was possessed of considerable fortune, both real and personal, he, after a devise of a term of years in Ireland, to his nephew J. B., devised all his estates and lands in Hertfordshire, Finchley, and Middlesex, to his nephew G. E. B., and certain other lands in Ireland to his nephews L. B. and C. B.; and afterwards directed that his said nephews should not be entitled to the possession of their estates until they respectively became of age; and that, if one or more of them should die before attaining twenty-one, then he devised the estate of him or them so dying to his nephew J. B. and his issue lawfully begotten; and if J. B. should die without issue, then to his next brother G. E. B.; and for default of such issue in G. E. B. to his nephew L. B., and his issue; and in default of such issue in L. B., to his nephew C. B. and his issue:—There was a similar limitation to his nephew S. B. and his issue, and for default of such issue to his niece C. B. and her issue, under such restrictions and limitations as she should think fit to dispose of the same amongst her issue, it being the intent of the will to prevent waste, by making the several children of the devisor's deceased brother, tenants for life only. The codicil then gave powers for devisors' nephews to make reasonable settlements on their wives, and to dispose of their respective estates among the issue of such marriages as they should think proper to limit and appoint. He then bequeathed the residue not disposed of to

DEVISE.

his nephews and niece aforesaid, except his nephew *S. B.*, to be divided among them equally at their respective ages of twenty-one; the shares of him or them so dying, to go to the survivor or survivors of them:—Held, that *G. E. B.* took an estate for life only, in the lands situate in the county of *Hertford*, devised to him by virtue of this will and codicil. *Bruce v. Bainbridge*, M. 1 G. 4.

Page 1

2. Devise of lands, &c. charged with two annuities, and subject to certain legacies, to trustees, their heirs and assigns, until devisor's nephew *A.*, son of his sister *B.*, should attain twenty-one, and if he should die in the mean time, until *C.*, second son of *B.*, should arrive at that age; and if *C.* should die in the mean time, until the daughter of *B.* should attain twenty-one—upon trust, to raise out of the rents of the premises, or by sale or mortgage thereof, portions for *C.* and the younger children of *B.*, payable on their attaining twenty-one; and further, to apply a proper sum out of the rents, for the maintenance and education of *A.* till he should attain twenty-one, and then to pay him the residue, and if he should die before twenty-one, then to apply a like sum for the maintenance of *C.* till he should attain that age, and then to pay him the residue, and in the mean time, to place out the money arising from the rents, at interest, for the benefit of *A.*; and when *A.* should attain twenty-one, or in case of his death, when and as soon as *C.* should arrive at that age, or in case of his death, when the daughter of *B.* should attain twenty-one, to the use of *A.* and

DISTRESS. 649

his assigns for life, *sans waste*, remainder to trustees to preserve contingent remainders; and after the death of *A.*, to the use of his first and other sons, &c. in strict tail, and for default of such issue, to the use of *C.*, with similar limitations over to his niece the daughter of *B.*, and an ultimate remainder to *B.* in fee. The devisor also directed, that his plate and furniture should remain in his house as heir looms. He died, leaving his sister *B.*, her sons *A.* and *C.*, and three younger children, alive. *A.* married, and died intestate, under twenty-one, leaving a daughter, *D.*:—Held, first, that *D.* became entitled to the estates devised, as tenant in tail, immediately on the death of her father, subject to the annuities and legacies as charged by the will. Secondly, that the heir-looms, being personally vested absolutely in her on the death of her father; and, thirdly, that the personal representative of *A.* was entitled to the savings of the rents and profits of the estates accrued in his life-time, subject to the said annuities and legacies. *Warter v. Hutchinson*, H. 1 & 2 G. 4.

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DISTRESS.

See POWER.

REPLEVIN, 1, 2.
VARIANCE.

1. A distress on growing crops of corn of the vendee of the sheriff for rent accruing due to the landlord subsequently to the entry under the execution and sale, cannot be sustained, unless such vendee allow the crops to remain uncut an unreasonable time after

they become ripe. *Peacock v. Purvis*, M. 1 G. 4. Page 79

2. One of several co-heirs in gavel-kind may distrain for rent due to himself and his co-heirs; without an express authority from them so to do. *Leigh v. Shepherd*, H. 1 & 2 G. 4. 207

EJECTMENT.

See POWER.

1. Where several tenants had been duly served with a copy of a declaration in ejectment, judgment may be entered against the casual ejector, although the notice at the foot of the declaration was not addressed to any or either of such tenants. *Doe, d. Pearson v. Roe*, M. 1 G. 4. 73
2. In every action of ejectment, the defendant must in future specify in the consent rule for what premises he intends to defend, and must consent in such rule to confess upon the trial, that the defendant (if he defends as tenant, or in case he defends as landlord, that his tenant) was, at the time of the service of the declaration, in the possession of such premises; and if upon the trial, the defendant shall not confess such possession, as well as lease, entry, and ouster, whereby the plaintiff shall not be able further to prosecute his suit against the said defendant, then no costs shall be allowed for not further prosecuting the same, but the said defendant shall pay costs to the plaintiff, in that case to be taxed. *Reg. Gen.* H. 1 & 2 G. 4. 310
3. In all country ejectments which shall be served before the essoign day, either of *Michaelmas* or *Easter* Term, the time for

the appearance of the tenant in possession must be within four days after the end of such *Michaelmas* or *Easter* Term, and must not be postponed till the fourth day after the end of *Hilary* or *Trinity* Term next respectively following. *Reg. Gen.* E. 2 G. 4. Page 637

ENROLMENT.

See ANNUITY, 2, 3.

ESCAPE.

See SHERIFF, 2.

ESSOIGN.

See EJECTMENT, 3.

ESTATE FOR LIFE.

See DEVISE, 1.

EVIDENCE.

See BANKRUPT, 2, 4.

COSTS, 2.

LIMITATIONS, STATUTE OF PARTICULARS OF DEMAND.

SEWERS.

SHERIFF, 1, 2.

USE AND OCCUPATION.

VARIANCE, 2, 4.

WITNESS.

1. Declarations made by a bankrupt, before and after the issuing of a commission against him, are inadmissible to shew that it was founded in fraud. *Lloyd v. Heathcote*, M. 1 G. 4. 129
2. A grant of wreck from *Hen. 2.* to the Abbey of *C.* by all their lands upon the sea, confirmed by *inspeximus* by *Hen. 8.* and a subsequent grant by him of the island of *B.* and its shores, belonging to the late Abbey of *C.*,

supported by evidence, that between forty and fifty years ago, the proprietor of the island of *B.* raised an embankment across a small bay, and had ever since asserted an exclusive right to the soil, without opposition: Held, that although the usage of forty years duration could not of itself establish such right, or destroy the rights of the public, yet, that it was evidence from which prior usage to the same effect might be presumed, and which, coupled with the general words contained in those grants served to establish such exclusive right. *Chad v. Tilsed*, H. 1 & 2 G. 4. Page 185

3. Under a power given by a marriage settlement to a tenant for life, to lease for years, determinable on three lives, reserving "such ancient and accustomed, or as great and beneficial rents, duties, and services, as had formerly been reserved, &c.:" and so as the lease contained "a power of re-entry for non-payment of the rent reserved, &c.:" evidence is admissible on the trial of an ejectment, to shew that the usual and accustomed form of leases by which the estate settled in the marriage settlement had been demised, as well before as after the date of the settlement, had contained a conditional proviso of re-entry, similar to that contained in a new lease, the validity of which was disputed at the trial. *Smith v. Doe, d. Jersey, (Earl)* E. 2 G. 4. 332

4. Where the lessees of a fishery, had publicly landed their nets on certain parts of the bank of a river, for more than twenty years, and had occasionally sloped and levelled such landing places; al-

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though no evidence was offered at the trial, to shew that the owner of the soil, or any person claiming under him, had any knowledge of the lessee's landing their nets:—Held, that as those acts could scarcely have been exercised without such knowledge, it was properly left to the jury to presume a grant of the right of landing nets to the lessees of the fishery, by some former owner of the soil. *Gray v. Bond*, E. 2 G. 4. Page 327

EXECUTION.

See BANKRUPT, 4.

DISTRESS, 1.

WARRANT OF ATTORNEY.

Where *A.* by deed, assigned all his effects at *W.* to trustees, for the benefit of certain creditors for four years, and the trustees were empowered to sell at the expiration of two years, or sooner, if *A.* should direct, and apply the proceeds of the sale in discharge of the debts of such creditors, who covenanted that *A.* might continue at home or abroad, and that they would not molest him for two years from the date of the deed:—Held, that such assignment was valid, and not within the statute 13 *Eliz. c. 5*, and that the property was thereby protected against a judgment creditor, who had sued out execution against *A.* after the deed was executed. *Goss v. Neale*, M. 1 G. 4. 19

EXECUTORS.

See PLEADING, 1.

1. A deed *inter partes* is only available between those who are parties to it:—Therefore, a deed between *A. B.* and the defen-

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dant of the one part, and *C. D.* of the other, whereby the two former agreed with the latter, his executors and administrators, to pay him a certain annuity for twenty-one years, or, in case of his death within the term, to the use of his child or children, if any, but if not, to his then wife, if she should remain his widow, and *C. D.* died within the term, leaving one daughter, who also died within the term, intestate, and his wife died in his lifetime:—Held, that the administrator of the daughter could not maintain any action against the defendant on the deed, for non-payment of the annuity, on the ground that she was no party to the deed, although she took a beneficial interest under it. But it seems, that the administrator of *C. D.* might sue, as, in case of a recovery by him, he might be considered as a trustee for such daughter. *Barford v. Stuckey*, M. 1 G. 4. Page 23

2. Where two makers of a promissory note gave it to a creditor of their testator, whereby "as executors, they severally and jointly promised to pay on demand with interest:"—Held, that they were personally liable. *Childs v. Monins*, H. 1 & 2 G. 4. 282

EXONERETUR.

See BAIL, 3.

EXTORTION.

See AMENDMENT.
SHERIFF, 1.

FACTOR.

See AGENT, 2. 3.

FIERI FACIAS.

See DISTRESS, 1.

GRANT.

FINE.

See COVENANT, 1.

If wood land be converted into arable, the Court will not allow a fine to be amended by increasing the quantity of the latter, as the land would pass under either description. *Webber, Plaintiff; Grey, Deforciant*, M. 1 G. 4. Page 94

FISHERY.

See EVIDENCE, 4.

FRAUD.

See ASSUMPSIT, 1.

FRAUDS, STATUTE OF.

See WILL.

FRAUDULENT CONVEYANCE.

See EXECUTION.

FREIGHT.

See INSURANCE, 1. 2.
LIEN.

Where, by a bill of lading, goods were to be delivered "to the defendant, nett proceeds paid to the plaintiff, or to his assigns, he or they paying freight for the said goods as *per charter-party*:" Held, that the freight was to be paid by the defendant, and that the nett proceeds to be paid the plaintiff, were what remained after such freight and other charges had been satisfied. *Thomson v. Adam*, H. 1 & 2 G. 4. 280

GAVELKIND.

See DISTRESS, 2.

GRANT.

See EVIDENCE, 2. 4.

INSURANCE.

GROWING CORN.

See DISTRESS, 1.

HEIR LOOM.

See DEVISE, 2.

HIGHWAY RATE.

See BANKRUPT, 2.

INCEPTION OF RISK.

See INSURANCE, 1.

INDICTMENT.

See BAIL, 2.

INDORSEMENT.

See SHERIFF, 1. 2.

INFERIOR COURT.

See COSTS, 3.

INQUIRY, WRIT OF.

See COSTS, 1.

INSPECTION AND PRODUCTION OF PAPERS.

Where the plaintiff entered into a contract with an auctioneer for the purchase of land by auction, and made a deposit in part of the purchase money, and afterwards brought an action against the defendants (the vendors), for interest, for not completing the purchase according to the conditions of sale:—Held, that the latter must produce such contract for the purpose of the plaintiff's inspecting it, or getting it stamped. *Gigner v. Bayly*, M. 1 G. 4.

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INSURANCE.

1. Where the owner of a vessel had entered into a contract with the

INTERLINEATION. 659

East India Company at Madras, through the medium of a correspondence with their agents, for freight, and the passage of invalids, and the ship had been surveyed by their officer, and represented to be fit for the purpose, after certain alterations had been made, and goods had been shipped, water taken in for the invalids, and the projected alterations commenced, but the completion prevented by the perils of the sea:—Held, in an action on a policy on freight and passage money, that there was an inception of the risk, and that the plaintiff was entitled to recover for passage money as well as freight:—Held also, that a contract for such a purpose need not be by charter-party, nor precise or definite in its terms. *Truscott v. Christie*, M. 1 G. 4.

Page 33

2. An abandonment to the underwriters on ship, transfers freight earned subsequently to such abandonment, as incident to the ship:—Therefore, where there had been two separate insurances on a general seeking ship, the one on ship and the other on freight; and the ship and freight were abandoned to the respective underwriters, who each paid a total loss, and the vessel was captured and re-captured, and ultimately performed her voyage and earned freight:—Held, that the underwriters on ship, under the abandonment of ship to them, were entitled to such freight. *Davidson v. Case* (in Error), M. 1 G. 4.

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INTERLINEATION.

See WILL.

ISSUE.

See DEVISE, 1.
PRACTICE, 2.

JURISDICTION.

See COSTS, 3.
SEWERS.

JUSTICE OF PEACE.

See CONSTABLE.

LANDLORD AND TENANT.

See COVENANT.

DISTRESS.

EJECTMENT, 1, 2.

POWER.

REPLEVIN, 1, 2, 3.

USE AND OCCUPATION.

VARIANCE, 2, 4.

LEASE.

See COVENANT.

EVIDENCE, 3.

POWER.

REPLEVIN, 1.

VARIANCE, 4.

LEASE AND RELEASE.

See RECOVERY, 4.

LEGACY.

See DEVISE, 2.

LIEN.

The defendant, as owner of a ship, entered into a charter-party with the freighter, by which the former "granted, and to freight let," and the latter "hired and to freight took" the ship for a voyage, out and home. The owner covenanted that the vessel, being well manned and furnished, as is usual for vessels in the merchant's service, the master should

LIEN.

receive on board at *London*, goods to be sent alongside her there by the freighter, and deliver them from alongside, at *Newfoundland*, to the agents of the freighter, according to bills of lading, and such cargo having been discharged there, to receive other goods in like manner, and deliver them at *Demerara*; and having discharged the same, should receive other goods there, and deliver them at *London*, agreeably to bills of lading. The owner also agreed, that the ship's boats should assist in unloading and loading the cargoes, when required by the freighter, provided no impediment was thereby to be made in carrying on the exclusive duties of the ship:—In consideration whereof, the freighter covenanted to send and take the goods from alongside, and to pay for the freight and hire of the vessel for the voyage, 2600*l.* with primage, &c.—one quarter part thereof, on delivery of the cargo at *Newfoundland*, by good bills at sixty days sight on *London*, and the remainder by good bills at two months date, from the day of the ship's report inwards at the port of *London*. The voyage was performed, and goods of third persons brought from *Demerara*, under bills of lading, deliverable to the consignees on payment of certain specified freight therein mentioned, which freight the owner received. Bills of exchange for one quarter's freight were drawn on the freighter at *Newfoundland*, which were afterwards accepted and dishonoured by him; and no sum, nor bill for the remaining three quarter's freight *per* charter-party were given or tendered to him on the return of the ship:—Held, first,

LIMITATIONS, STAT. OF.

that taking the whole of the charter-party into consideration, the possession of the ship did not pass to the freighter, but remained in the owner, notwithstanding the words of grant used in its commencement, and that the mere circumstance of his having entered into an agreement with the charterer, as to the mode by which he should be paid for freight, did not divest him of his lien on the cargo for freight, and that it made no difference that he had delivered the homeward cargo to the consignees, and received the freight due upon the bills of lading, which was different from that due upon the charter-party. Secondly, that the owner had a lien on the goods of the consignees of the homeward cargo, mentioned in the bills of lading, to the extent of the freight stipulated for therein, as a security for his freight due upon the charter-party. *Christie v. Lewis*, H. 1 & 2 G. 4.

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LIMITATIONS, STATUTE OF.

See CONSTABLE.

Where the plaintiff, in a declaration of *assumpsit*, stated, that in consideration that he would employ the defendant (an annuity broker), to invest and lay out the plaintiff's money in the purchase of an annuity, the defendant undertook to invest it on good and valid security; and assigned for breach, that he laid it out on a bad, invalid, and fraudulent security; and the defendant pleaded *non assumpsit infra sex annos*, and *actio non accrevit infra sex annos*, on which issue was joined, and it was proved that the consideration money was paid over

MORTGAGE.

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to the grantor, and the annuity paid by the hands of the defendant to the plaintiff for six years afterwards, when the grantor became bankrupt, and the security failed; subsequently to which, the defendants' managing clerk promised that the plaintiff should be paid, which promise the defendant afterwards recognized:—Held, that the undertaking stated in the declaration, being as to the validity of the security, the subsequent promise could not apply, although it might have given a new right of action on a declaration specially framed for that purpose. *Whitehead v. Howard*, M. 1 G. 4. Page 105

MAGISTRATE.

See CONSTABLE.

MARRIAGE SETTLEMENT.

See EVIDENCE, 3.
POWER, 1.

MEMORIAL.

See ANNUITY.

MISNOMER.

See ARREST.

MONEY HAD AND RECEIVED.

See AGENT, 2.
ASSUMPSIT, 1, 2.
BANKRUPT, 1.

MONEY PAID.

See BANKRUPT, 3.

MORTGAGE.

See BANKRUPT, 3.
BOND.
DEVISE, 2.

556 PARTICULARS, &c.

NEW TRIAL.

See COSTS, 2.

PARTICULARS OF DEMAND.
SEWERS.
USURY.

NOTICE.

See BAIL, 4.
EJECTMENT, 1.

OBLITERATION.

See WILL.

OFFICER.

See AMENDMENT.
BANKRUPT, 2.
CONSTABLE.
SHERIFF, 1, 2.

ORDER OF REFERENCE.

See AWARD.

OYER.

See BOND.

PARTICULARS OF DEMAND.

Where the plaintiff declared on three bills of exchange, as distinct causes of action, in three several counts, but by his particular of demand confined his right to recover on the bill set forth in the first count only,—and the defence was, that the defendants were not partners when that bill was drawn, and the plaintiff offered in evidence the two other bills of a subsequent date, but drawn at the same place as the former, for the purpose of shewing a continuing partnership, which were rejected,

PILOT.

on the ground that they were not included in the particular;—the Court granted a new trial. *Duncan v. Hill*, E. 2 G. 4. *Page* 567

PARTNERS.

See USURY.
VARIANCE, 3.

PASSAGE MONEY.

See INSURANCE, 1.

PAYMENT.

See BANKRUPT, 1.

PENAL ACTION.

See PILOT.
SHERIFF, 1.

PENALTY.

See AMENDMENT.

PERJURY.

See BAIL, 2.

PETITIONING CREDITOR.

See WITNESS, 1.

PILOT.

In an action against the master of a vessel for penalties under the 34th section of the Pilot Act, 52 Geo. 3. c. 39, the declaration must allege, that a licensed pilot offered the master to take charge of the vessel, or made such offer in his presence or hearing; and it is not sufficient merely to follow the general words of the statute. It seems also necessary to state when such offer was made. *Peake v. Carrington*, H. 1 & 2 G. 4. 176

PLEADING.

PLEADING.

See AMENDMENT.

ARREST, 2.

ASSUMPSIT, 2.

BOND.

COVENANT, 2.

DISTRESS, 2.

EJECTMENT, 1.

LIMITATIONS, STATUTE OF.

PILOT.

REPLEVIN.

USURY.

VARIANCE.

1. Plea, that the defendants were executors, and made a promissory note as such, and *plene administraverunt præter*. Special demurrer thereto, that they had thereby made themselves personally liable, and admitted that they had assets for the payment of the note, and that it might have been given for their own debt, and that they having promised to pay with interest, they could not become liable for it in their representative character:—Held, that such plea was bad, and afforded no answer to the action. *Childs v. Monins*, H. 1 & 2 G. 4. Page 282
2. In a declaration of debt on a bail bond, at the suit of the assignee of the sheriff, it was stated, that the plaintiff heretofore, to wit, on the 21st July, sued out of the Court of the Bench *here*, (the said Court being then and *now* at *Westminster*), a writ of *capias ad respondendum*, by which *T. B.* was to answer the plaintiff in a plea of trespass; and also in a certain plea of trespass on the case upon promises:—On special demurrer, assigning for causes, that the 21st July, was a day in vacation, and on which no such Court *then* was

POWER.

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at *Westminster*; and that the declaration only stated the writ to be to answer the plaintiff in a plea of trespass, instead of a plea "wherefore with force and arms, &c." :—Held, first, as the averment that the Court was sitting on a day in vacation, was laid under a *videlicet*, it might be treated as surplusage; and secondly, that it was unnecessary to set out or refer to the *clausum fregit* of the writ. *Lockett v. Plummer*, E. 2 G. 4.

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PLEDGE.

See AGENT, 2, 3.

POWER.

See EVIDENCE, 3.

RECOVERY, 4.

1. Under a power given by a marriage settlement to a tenant for life, to lease for years, determinable on three lives, reserving the ancient and accustomed rents, duties, &c. "so as there be contained in every such lease a power of re-entry for non-payment of the rent thereby to be reserved:" A lease for ninety-nine years, determinable on three lives, with a proviso for re-entry "if the rent, duties, &c. should be unpaid, or undone, in part or in all, by the space of fifteen days next over or after the day of payment, &c., and no sufficient distress or distresses could be had or taken on the premises:"—was held, in an action of ejectment by the reversioner against the lessee, to be a valid execution of the power. *Smith v. Doe*, d. *Jersey*, (Earl) E. 2 G. 4. 332
2. Where a power of leasing for years, required the insertion in

PRACTICE.

the leases of a clause of re-entry if the rent should be behind for 21 days; and leases were afterwards made with a power of re-entry if the rent should be behind or unpaid for twenty-one days, and no sufficient distress could be had:—Held, that such leases were valid, and might be supported. *Tankerville (Lord) v. Wingfield.* Page 346, n.

PRACTICE.

See AFFIDAVIT TO HOLD TO BAIL.
AMENDMENT.
ARREST.
ATTORNEY.
AWARD.
BAIL.
BAIL-BOND.
COSTS.
EJECTMENT.
INSPECTION OF PAPERS.
PARTICULARS OF DEMAND.
VARIANCE, 3, 5.
WARRANT OF ATTORNEY.

1. Where the defendant was served with a copy of a *capias*, and a quarter of an hour afterwards demanded to see the original, which was refused by the officer; the Court set aside the service and subsequent proceedings. *Westley v. Jones*, H. 1 & 2 G. 4. 162
2. A defendant may carry the record of an issue directed by the Vice Chancellor down to trial, on the ground that the plaintiff endeavoured to delay it. *Bassett v. Osborne*, E. 2 G. 4. 473

PREMIUMS OF INSURANCE.

See ANNUITY, 1.

RECOVERY.**PRESUMPTION.**

See EVIDENCE, 2, 4.

PRINCIPAL AND AGENT.

See AGENT.

PRIVILEGE.

See COSTS, 3.

PROCESS.

See PRACTICE, 1.

PROMISSORY NOTE.

See BANKRUPT, 1.
EXECUTORS, 2.
PLEADING, 1.

RATE.

See SEWERS.

RE-ADMISSION OF ATTORNEY.

See ATTORNEY.

RECORD.

See PRACTICE, 2.

RECOVERY.

1. If marsh land be described as land generally, in a recovery, it may be amended by inserting the word "marshey" before "land," on an affidavit stating how the premises had been occupied since the recovery was suffered. *Phillips*, Demandant; *Field*, Tenant; *Rolfe*, Vouchee, M. 1 G. 4. Page 98
2. A recovery may be amended, by inserting a "fee farm rent." *Times*, Demandant; *Meredith*, Tenant; *Edwards*, Vouchee, E. 2 G. 4. 474
3. The Court permitted a recovery to be completed *nunc pro tunc*, which had been delayed in con-

RECOVERY.

sequence of one of the vouchees having left this country and resided abroad, on account of ill health. *Carr*, Plaintiff; *Phillips*, Demandant; *Evans*, Vouchee. E. 2 G. 4. Page 557

4. A. being seised of an estate in fee, devised the same to his son B. for life, remainder to the son and sons of the said B. in tail, in such shares and proportions as he should by will appoint, with other remainders over. B. had four sons, C., D., E., and F. By indentures of lease and release for the purpose of barring all estates tail, and extinguishing the power of appointment so vested in B., he and three of his sons C., D. and E., conveyed the entirety of the premises to G. K. as tenant to the *præcipe*, so that one or more recoveries might be suffered, in which B., C., D., and E. should be vouchees. A recovery of the entirety of the premises was afterwards suffered, in which C. and D. were vouched. By indentures of lease and release, for the same purpose as before, B. and his sons C., D., E., and F., conveyed all the premises to G. K., as tenant to the *præcipe*, so that one or more recoveries might be suffered, in which C., D., E. and F. should be vouchees. A second recovery was suffered of the same premises, in which F. was vouched, and a third was also suffered, in which E. was vouchee. B. died without executing any appointment:—Held, that by these conveyances and recoveries, the estates tail in C., D., E. and F., were well barred, for that although the interest of each of them was peculiar, it did not exhaust the entirety, but left an interest in each of the others, who

REPLEVIN. 659

were not vouched, and which was not intended to be affected, and that an estate of freehold, co-extensive with such unaffected interest, remained in the tenant to the *præcipe*, so as to give validity to the last recovery. *Coll. yer v. Mason*, E. 2 G. 4. Page 597

RE-ENTRY.

See POWER, 1.

REFERENCE.

See AWARD.
TROVER.

REGULÆ GENERALES.

310, 637

RELEASE.

See WITNESS, 1, 2.

RENDER.

See BAIL BOND.

RENEWAL.

See COVENANT, 1.

RENT.

See DISTRESS, 2.
POWER, 1, 2.
REPLEVIN, 1, 2.
VARIANCE, 4.

REPLEVIN.

See DISTRESS, 2.
VARIANCE, 4.

1. To a declaration of replevin for taking the plaintiff's goods, the defendants avowed, that one T. P., for two years next before and ending on the 6th April, 1819, and from thence until, &c. was tenant to them, by virtue of a demise to him made, at the yearly rent of 298*l.*, payable half-yearly,

and that one year's rent being due from him to them, on the day aforesaid, they well avowed the taking, &c.—Plea in bar, that one *W. P.*, before the making the demise in the avowry mentioned, and before the defendants had any thing in the premises, to wit, on the 6th April, 1815, was seised thereof in fee, and being so seised, demised the same to the plaintiff, to hold to him for one year, and so from year to year, so long as they should respectively please, at the yearly rent of 20*l.*—that *W. P.* being so seised, the plaintiff entered under the demise made to him, and so remained until the said time when, &c.—that *W. P.* being entitled to the reversion, on the determination of the demise to the plaintiff, on the 1st December, 1815, demised the premises to *T. P.* for fourteen years, at the yearly rent of 298*l.* payable half-yearly;—that after the making that demise, and during the continuance of the plaintiffs, *W. P.* conveyed the premises to the defendants in fee, and that they had nothing therein at the time of making the distress, except by virtue of that conveyance, and subject to the previous demise to the plaintiff;—that *T. P.* did not enter under the demise to him, but that the plaintiff was in possession by virtue of that made to him, and held the same of the defendants, as assignees of *W. P.*, and paid them the yearly rent of 20*l.*, so reserved under that demise, which was still subsisting and undetermined;—that none of that rent was in arrear from the plaintiff, but that all arrears thereof were paid at the time of the distress, and that the defendants took the plaintiff's

goods of their own wrong:—Without this, that *T. P.*, during the whole or any part of the time in which the rent in the avowry was alleged to be in arrear, held as tenant to the plaintiff, otherwise than as in the plea was alleged. Replication, that *T. P.*, during the whole of the time in which the rent in the avowry was alleged to be in arrear, held as tenant to the defendants, as they had in their avowry alleged.—Special demurrer thereto, assigning for causes, that the defendants had not traversed the making of the demise by *W. P.* to the plaintiff, or the continuance thereof, or that the plaintiff, when the arrears of rent for which the distress was made, held the premises by virtue of that demise;—that it was not alleged, that such demise had ceased, nor was it shewn that any of the rent reserved under it remained unpaid, and that the defendants had not taken issue on the traverse offered by the plea in bar, nor sufficiently denied, confessed, or avoided the matters therein alleged;—that no proper issue was taken by the replication; and that it attempted to put in issue a fact immaterial, and not issuable with relation to the matters in the said plea. The Court over-ruled the demurrer, as the replication put the material point in issue between the parties, viz. whether *T. P.* held under the defendants as stated by them in their avowry; and as the facts alleged in the plea in bar, previous to the traverse, were matter of inducement only. *Upton v. Curtis*, H. 1 & 2 G. 4. Page 201

2. To a cognizance for rent in arrear: Plea in bar, that the de-

SETTING ASIDE, &c.

fendant, on a former occasion, made a distress for the same rent, and took goods liable to distress, sufficient to discharge the rent in arrear, and the costs of the distress, and might thereby have paid the arrears of rent, but neglected so to do, and wrongfully made a second distress for the same rent:—Held, ill on special demurrer, assigning for cause, that the plea did not shew that the rent was satisfied by the former distress. *Hudd v. Ravenor*, E. 2 G. 4.

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3. An avowry by one of several co-heirs in gavelkind, in his own right, and a cognizance as bailiff of the others, is sufficient, without averring any authority from them to distrain. *Leigh v. Shepherd*, H. 1 & 2 G. 4. 297

REPLICATION.

See BOND.

REQUESTS, COURT OF.

See COSTS, 3.

REVOCATION.

See WILL.

RISK.

See INSURANCE, 1.

SALE.

See ASSUMPSIT, 1.

BANKRUPT, 3.

DISTRESS, 1.

EXECUTION.

INSPECTION OF PAPERS.

SETTING ASIDE PROCEEDINGS.

See ARREST, 2.

PRACTICE, 1.

SHERIFF.

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SET-OFF.

See COSTS, 1.

SEWERS.

A decree by the Commissioners of Sewers, is not conclusive against a party assessed for the payment of a rate, and who resides within the district over which they have jurisdiction; but such party may prove in an action of trespass brought by him against one of the collectors of the rates, for taking his goods to satisfy such rate, that he derived no benefit from the sewer in respect of which the assessment was made; and such evidence having been rejected at *Nisi Prius*, the Court granted a new trial. *Stafford v. Hamston*, E. 2 G. 4. Page 608

SHERIFF.

See AMENDMENT.

ARREST, 2, 3.

BAIL BOND.

BANKRUPT, 4.

DISTRESS, 1.

EXECUTION.

PLEADING, 2.

1. In an action of debt against a Sheriff, to recover penalties for the extortion of his officer, in taking a larger fee than was allowed on the discharge of a person out of custody on giving bail:—Held, that the indorsement of the name of the officer on the writ, was sufficient to connect him with the Sheriff, without shewing that such indorsement was made with his authority. *Bowden v. Waithman*, H. 1 & 2 G. 4. 183
2. Where, in an action for an escape against the Sheriff, the writ in the former action was pro-

SURPLUSAGE.

duced to connect him with his officer, on which was indorsed "Warrant to B.," who, on being called, stated that he had delivered the warrant to another, who did not produce it:—Held, that it should have been left to the Jury to say, whether B. acted under the authority of the Sheriff, the indorsement being *prima facie* evidence that he did so act. *Fermor v. Phillips.* Page 184, n.

SHIP.

See BILL OF LADING.
FREIGHT.
INSURANCE.
LIEN.
PILOT.

STAMPS.

See INSPECTION OF PAPERS.

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See COVENANT, 2.
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TRADING.

See BANKRUPT, 2. 4.

TRESPASS.

See CONSTABLE.
COSTS, 1.
EVIDENCE.
SEWERS.
TROVER.
WITNESS, 2.

TURNKEY. 663

TRIAL.

See PRACTICE, 2.

TROVER.

See AGENT, 3.
BANKRUPT, 4.

A. brought an action of trespass against B., for taking away a filly. B. justified the taking as the servant of C. The Jury found a verdict for A., with damages, subject to a reference to D., one of the jurors, to ascertain to whom she belonged, which was to depend on whether a scar should appear on a certain part of her body, and in case it should, the verdict for A. was to stand, if not, it was to be entered for B. The filly was delivered to D. by the consent of all parties, and he made his award, and found her to belong to A., and accordingly ordered the verdict found for him to stand. C., ten days after the award, demanded the filly of D. who refused to deliver her, and a fortnight after, he brought an action of trover for her recovery: Held, that the detention of the filly by D. did not, under the circumstances, amount to a conversion, as C. was no party to the original action, and as it did not appear that he was authorized by B. to make the demand, to whom alone D. was bound to deliver her, he only being liable for the damages awarded to A. *Guntton v. Nurse*, H. 1 & 2 G. 4.

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TRUSTEES.

See DEVISE, 2.
EXECUTION.
EXECUTORS, 1.
WITNESS, 1.
TURNKEY.
See BAIL, 1.

UNDERWRITER.

See INSURANCE, 2.

USAGE.

See EVIDENCE, 2.

USE AND OCCUPATION.

See COSTS, 1.

A. took a farm under an agreement from *B.* that *A.* should have the exclusive right of sporting over the manor in which it was situate, and should also occupy certain glebe land within the parish. *A.* entered into possession, but did not sign the agreement; and it appeared that *B.* had no power of conferring the right of sporting, nor could he procure the glebe land. In an action for the use and occupation of the farm:—Held, that evidence was admissible to shew the annual value of the land without such right, which might be ascertained by the Jury, independently of the amount of the rent, reserved by the agreement. *Tomlinson v. Day*, E. 2 G. 4. Page 558

USURY.

The plaintiff and defendant covenanted by deed to become partners in the business of army clothiers, for ten years, and that the plaintiff should advance 20,000*l.* as part of the capital for carrying on the business, and that the defendant should provide a like sum; that the plaintiff, during the continuance of the partnership, should receive out of the profits, if they were adequate, or if not, out of the capital, 2,000*l.* *per annum* for his share of the profits; that he should not be answerable for any losses or expences incident to

VARIANCE.

the concern, and that the business should be carried on in the name of the defendant alone. The defendant then covenanted, that on the determination of the partnership by effluxion of time, the sum of 20,000*l.* should be repaid to the plaintiff by instalments, at three months date, bearing legal interest; and that if default was made in the annual payment of 2,000*l.* or the joint capital was at any time reduced to 20,000*l.*, then the plaintiff should be at liberty to terminate the partnership, and repay himself the 20,000*l.* advanced, immediately; and the defendant was to guaranty all debts, and pay all losses. In an action of covenant, brought by the plaintiff, to recover the 20,000*l.* at the expiration of the ten years, the defendant pleaded, that the deed was executed by way of shift, in pursuance of an usurious contract; which plea, upon issue joined, was negatived by the verdict of the Jury:—Held, that after that finding, the deed must be taken to disclose the real intention of the parties, and that upon the face of it, the plaintiff and defendant must be deemed partners, and that it was not void as being a loan of money within the meaning of the statute of usury; and the Court refused to grant a new trial, or arrest the judgment. *Enderby v. Gilpin*, E. 2 G. 4. Page 571

VARIANCE.

1. A declaration in *assumpsit* stated, that in consideration that the plaintiff, at the request of the defendant, would lend a horse of his, to be used by the latter for a given time, the defendant promised to take proper care of him, and return him to the plaintiff in

VARIANCE.

as good a condition as he was in at the time of the promise, or pay the plaintiff fifteen guineas. It was proved at the trial, that in addition to these terms, the contract was, that the defendant should find the horse meat for his work:—Held, that this was no variance, as the contract was sufficiently stated in the declaration, and as the law would imply that a person who hires a horse is bound to provide him with food, unless there be an agreement to the contrary. *Handford v. Palmer*, M. 1 G. 4. Page 74

2. In covenant for not repairing:—if the covenant to repair contains an exception of “casualties by fire,” it is fatal on *non est factum* to state it in the declaration as a general covenant to repair, omitting the exception; and the Court will not allow the plaintiff to amend on payment of the costs of the trial; but leave him to his remedy, by bringing a fresh action. *Brown v. Knill*, H. 1 & 2 G. 4. 164
3. Where plaintiffs issued a writ against a defendant in their own names, and declared in their own right, and described themselves in the affidavit to hold to bail as surviving partners,—it is a fatal variance;—and the Court ordered the bail-bond to be cancelled, and would not allow the plaintiffs to amend their writ and declaration, on payment of costs. *Attwood v. Rattenbury*, H. 1 & 2 G. 4. 209
4. In an avowry, founded on a distress for rent, the defendant averred, that the plaintiff held certain *strata* or veins of iron-stone, under a lease, which contained a proviso, that “if the stone should not be wholly gotten or wrought out within the term of eight years from the commencement of the demise,

WARRANT, &c. 655

the rent in respect of such as should then remain ungotten, should be paid to the lessor.” On the production of the lease, the proviso contained the additional words “if the same should be found to be gettable:”—Held, that this was a fatal variance, and that the plaintiff was entitled to recover on *non est factum*; and it seems, that he would only be liable to pay for such stone as could be gotten, and not for that which was not gettable. *Adam v. Duncalfe*, E. 2 G. 4. Page 475

5. Where the *ac etiam* in a writ was “in a plea of trespass on the case upon promises,” and the declaration was delivered in debt; it is a fatal variance, and the Court ordered an *exoneretur* to be entered on the bail-piece, and would not allow the declaration to be amended by filing it in *assumpsit*. *Maberley v. Benton*, E. 2 G. 4. 483

VENDOR AND PURCHASER.

See BANKRUPT, 3.

VIDELICET.

See PLEADING, 2.

WARRANT.

See CONSTABLE.
SHERIFF.

WARRANT OF ATTORNEY.

Where the defeasance on a warrant of attorney stated that it was given to secure the payment of a sum *on demand*, and that in case default should be made, judgment was to be entered up, and execution issue:—Held, that an actual demand must be made before the issuing of execution thereon; and that a proposal to

the defendant to settle amicably, does not amount to such a demand. *Nicholl v. Bromley*, H. 1 & 2 G. 4. Page 307

WILL.

See DEVISE.

Where a will which was written on three sides of one sheet of paper, and duly attested by three witnesses, concluded by stating, "that the testator had signed his name to the two first sides thereof, and his hand and seal to the last;" and it appeared, that he had put his name and seal to the last only, but had omitted to sign his name to the two first sides: Held, that the will was well executed, as, whatever might have been the testator's former intention, it was abandoned by the final signature made by him at the time of executing the will. So, where the testator had executed such will, by which he devised certain real estates to his wife for life, and on her death, to *I. S.*, and on the death of both, to his executors in fee, upon certain trusts; and some years afterwards, he made various interlineations and obliterations therein, confining the first devise made to his wife, to her widowhood, and striking out the devise to *I. S.*, and obliterating the original date, and substituting the day of *November*, instead thereof, and the will was never re-signed, re-published, nor re-attested, but a fair copy was afterwards prepared, and the testator added

WRIT.

one interlineation therein, not affecting his real estate, but which copy was never signed, published, or attested, and the will, thus altered, and fair copy, were found locked in a drawer together, at the residence of the testator, after his death:—Held, that there was no revocation of the will as it originally stood, as the alterations and obliterations were merely demonstrative of a future intent of the testator, to execute another will, which was never carried into effect. *Winsor v. Pratt*, E. 2 G. 4. Page 484

WITNESS.

1. An assignee of a bankrupt, having released his claim as a creditor on the bankrupt's estate, is a competent witness to support the petitioning creditor's debt, as he merely stands in the situation of trustee to such estate. *Tomlinson v. Wilkes*, H. 1 & 2 G. 4. 172
2. In trespass, a person who commits the trespass, but is not sued, is a competent witness for the plaintiff against his co-trespasser, without being released by the plaintiff. *Morris v. Dauxbigny*, E. 2 G. 4. 319

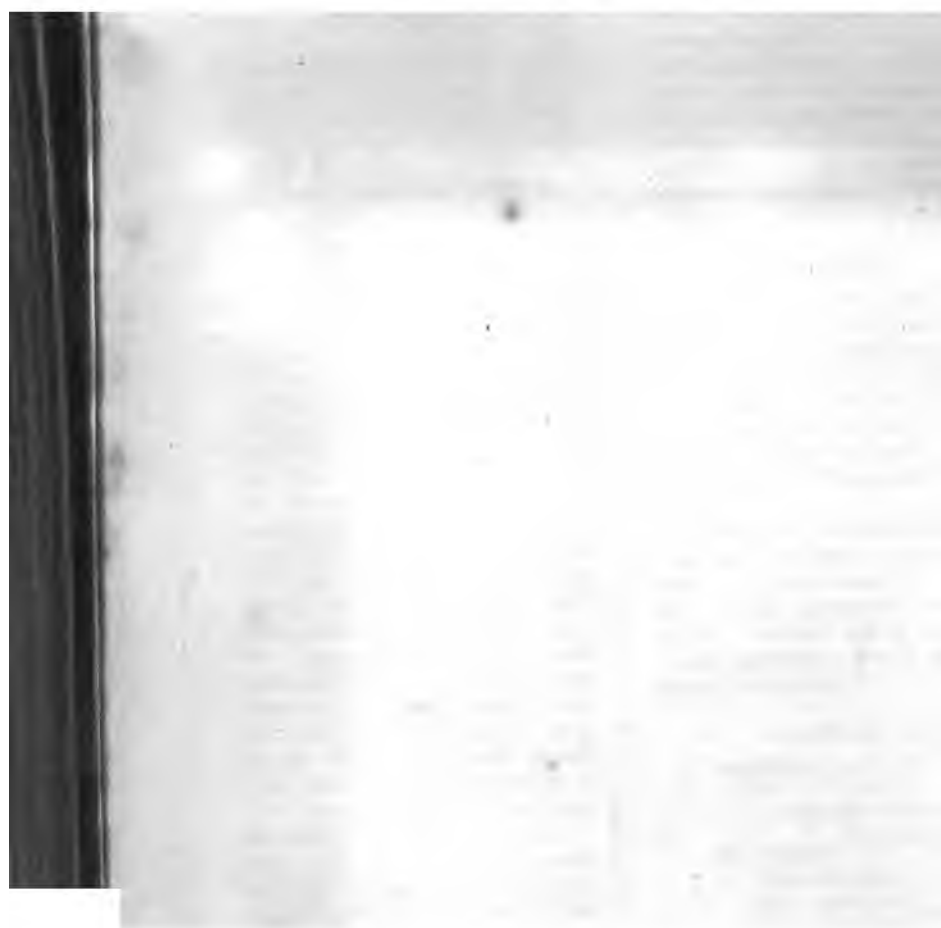
WRECK.

See EVIDENCE, 2.

WRIT.

See ARREST, 2.
BAIL BOND.
PLEADING, 2.
SHERIFF, 1, 2.
VARIANCE, 3. 5.

END OF THE FIFTH VOLUME.



1

2





